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DIGEST
OF THE
LAW OF DISCOVERY
WITH PRACTICE NOTES

HIS HONOUR JUDGE BRAY

SECOND EDITION

E. J. MARSHALL

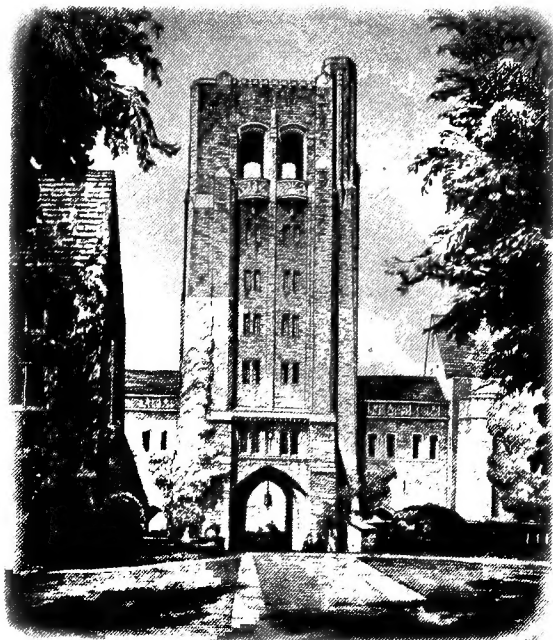
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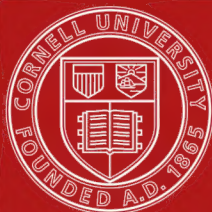
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DIGEST
OF
THE LAW OF DISCOVERY
WITH
PRACTICE NOTES

BY
HIS HONOUR JUDGE BRAY
(AUTHOR OF "BRAY ON DISCOVERY")

SECOND EDITION

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PREFACE.

A CONSIDERABLE time has elapsed since the Author's book on Discovery was written, but the somewhat voluminous notes written by him for, and published in, the "Annual Practice" under Order 31, and which are revised every year, seemed to him to render anything in the nature of a second edition unnecessary. It has, however, been suggested that a concise statement of the leading principles and points of discovery referring to, and followed by, the rules and notes might be useful to the profession. It is hoped that the form adopted will enable the practitioner to follow the general principles more readily than if he has to hunt for them in the rules and scattered notes. The Practice notes have also been thoroughly revised for the purpose of this book.

The Author has to thank the Editors and Publishers of the "Annual Practice" for their courtesy and assistance.

E. B.

February, 1904.

The book having been sold out, the Publishers have suggested that it should be reprinted with the "Annual Practice" notes of the present year. The author has made some additions to a few of the articles, and the notes to the articles have been revised.

E. B.

October, 1910.

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PART I.

DIGEST OF THE LAW OF DISCOVERY.

DISCOVERY GENERALLY.....	ART. 1-14
INTERROGATORIES	ART. 15-22
DISCOVERY AND PRODUCTION OF DOCUMENTS ...	ART. 23-37
OBJECTIONS TO DISCOVERY	ART. 38-67

Discovery Generally.

1. Discovery is the name given to the practice by which a party in any civil (a) cause or matter (b) may be compelled to answer questions as to facts (interrogatories), and to produce documents relating to the matters in question before their determination.

(a) See Bray, p. 3.

(b) See *infra*, p. 21.

2. The practice of discovery in the High Court (a) is now governed by the rules (O. 31) made under the Judicature Acts. But where no provision is made by the rules the old procedure and practice remain in force. The rules of equity generally prevail.

See *infra*, p. 24.

(a) As to P.D. and A. Div. see p. 22, and as to Informations, p. 21.

3. Under ordinary circumstances discovery is and must be given by a party on his own oath, and the person who is the party is alone under any obligation in the matter. But this may be from the nature of things impossible (for instance, in the case of a corporate body, or a lunatic, or an infant of

tender age), or it may be for other reasons impracticable. In such cases discovery is sometimes given by some person on the party's behalf.

In the case of a plaintiff it was said by Lord Cairns (*U. S. A. v. Wagner*, L. R. 2 Ch. p. 504), that a party is not disabled from suing because discovery cannot be got from him, and that the person, state or corporation which has the interest must be the plaintiff, and the Court will do the best the law admits of to secure the defendant such defensive discovery as he may be entitled to.

See as to A.-G. and Crown, *infra*, p. 21 : as to corporate bodies, Arts. 18 and 24 : as to foreign states, *infra*, p. 21 : as to infants, r. 29 : as to lunatics (n.) to r. 29, *infra* : as to sheriffs, r. 28 : as to persons suing in other persons' names, *infra*, p. 48 : and see Art 25 as to the words "on oath" in rr. 12 and 14.

4. The penalties for failure to give discovery are dealt with by rr. 21-23.

5. The discovery must be relevant or material (Art. 10) to the matters in question (a) in the cause or matter (b).

(a) See (n.) to Art. 62 as to discovery being limited to what is relevant to the party's own case.

(b) See *infra*, p. 21.

6. The matters in question in respect of which the party is entitled to discovery are the matters which he has well pleaded (or otherwise raised), so as to entitle him to have them tried, and which are about to be tried. His opponent cannot by denying his case shut him out from discovery alleged to support that case.

See Bray, p. 18.

7. Generally a party is not entitled to discovery until he has properly pleaded or stated his case (see Art. 6), and then only in support of that case, and not to fish out a case (a); but in some instances a party has been allowed discovery in order to enable him to give particulars or further particulars (b). Where the other party has referred to a document in his pleading or in an affidavit he may, under r. 15 (see Art. 66), be entitled to inspect it before pleading or stating his case.

(a) See *infra*, p. 23.

(b) There is no hard and fast rule as to the class of cases in which this will be allowed : it will be allowed in cases of fiduciary relationship and may be allowed in other cases : but not in support of what appears to be a mere fishing case : and as to discovery to support particulars of justification in actions of defamation, see *infra*, p. 43.

8. If the right to discovery depends on the determination of any issue or question in dispute, or for any other reason it is desirable that any issue or question in dispute be determined before deciding on the right to discovery, such issue or question may be ordered to be determined first and the question as to the discovery be reserved: under any circumstances the discovery may be confined to what is material or necessary at the stage when it is applied for (a). Discovery for ascertaining the amount of the claim, or for working out a judgment or order, may be obtained after the right has been established, whether it has been applied for before and reserved or not (b).

(a) See *infra*, pp. 42 and 50, and r. 20.

(b) See *infra*, p. 23.

9. The discovery should on principle (a) be confined to what is relevant to the matters in question between the applicant and the party giving the discovery, and should not extend to what is relevant solely to matters which are only in question between the applicant and another party; but the principle has not been adhered to. There is a matter in question between parties for this purpose (they are opposite parties), even although they are on the same side of the record and are both plaintiffs or both defendants, if there is any right to be adjusted or determined between them.

(a) See *Bray*, p. 59, and *infra*, p. 41.

The expression in r. 1 relating to interrogatories is "opposite parties": and in rr. 12—19A, relating to production of documents, "any other party": but the latter means "opposite party," in the wide sense above attributed to those words. In *Spokes v. Grosvenor*, cited *infra*, p. 22, a plaintiff was allowed discovery of documents against a defendant company (who were formal parties only) as being opposite parties on the record and therefore within r. 12. See generally, *infra*, p. 22.

10. Discovery is relevant or material, not only if it is directed to the facts directly in issue, but also if it is directed to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue; if an interrogatory does not relate to the matters in issue, it is not relevant, although it might be put in cross-examination (r. 1); it may be directed not only to giving the applicant a knowledge of what he does not know, but also for the purpose of getting admissions; to informing the applicant as to evidence

to be obtained for his case, or to ascertain the names of persons who may give evidence for him; to ascertain whether the opponent is only a nominal party and the name of the real person interested, so as to let in his statements (a); to damages; to paying a proper sum into court; to obtaining any relief to which he might be entitled; and under some circumstances to ascertaining the names of persons to make them parties (b). Material documents are not only such as would be admissible in evidence; they are material if they contain information which may either directly or indirectly enable the applicant either to advance his own case or damage that of his adversary, or if they may fairly lead him to a train of inquiry which may have either of these two consequences, or if they will throw any light on the case (c). Discovery relating exclusively to the opponent's case is also obviously relevant, although it may be withheld if it is within the rule protecting a party's evidence (see Arts. 62—65).

(a) See Bray, p. 89.

(b) See *infra*, pp. 41—42, generally.

(c) See *infra*, p. 54.

11. The discovery must be necessary for disposing fairly of the cause or matter, or for saving costs.

An express provision to this effect has been introduced into the rules. See rr. 2, 12, 18.

The rules also provide for objections to discovery on the ground of its being unnecessary, or unnecessary at the particular stage, or oppressive: see rr. 6, 7, 12 and 20, and notes thereto. Formerly relevant discovery was almost as of right.

12. A deposit to secure the costs of the discovery may have to be made by the party seeking discovery. This applies to interrogatories and to a general affidavit of documents, not to an affidavit as to specific documents under r. 19A, nor to inspection.

See rr. 25—27A, *infra*.

13. A person cannot be made a party to an action for relief for the purpose of discovery; but if he is properly made a party, discovery may under some circumstances be had from him, although no relief is claimed against him (see Art. 9).

See *infra*, p. 48.

14. Actions for discovery may still be brought.

See *infra*, p. 37.

Interrogatories.

15. Interrogatories must now be allowed by the judge under rr. 1 and 2, but allowing an interrogatory does not preclude an objection on any ground being taken to answering it altogether or in part.

See *infra*, pp. 37—38.

16. A party must answer interrogatories according to the best of his knowledge, information, recollection and belief, unless he has any valid ground of objection (Art. 41).

However disagreeable (per Lord Langdale) it may be to make the disclosure, however contrary to his personal interests, however fatal to his case, he is required and compelled under the most solemn sanction to set forth all he knows, believes or thinks in relation to the matters in question. The most private and confidential communications may have to be disclosed, see (n.) to Art. 41.

It is certainly admissible to state the grounds on which the party's belief is founded: it is under some circumstances perhaps obligatory in order that its reality and value may be tested.

See generally, Bray, pp. 127—143.

17. He must disclose not only the information which he has at the time of the application from whatever source derived (subject as stated in the previous Article), but where discovery is required as to things or matters alleged to have been (or in fact) done or omitted to be done by or in the presence of his servants or agents or to have otherwise occurred (or which in fact occurred) in the course of their employment, he must obtain or make reasonable efforts to obtain from them the information which they have acquired in the course of such employment; nor can he escape the obligation to give such information because it may have been communicated under privileged circumstances which protect from production the actual communication (see Arts. 55 and 60).

See *infra*, p. 46.

18. Where interrogatories are delivered under r. 4 to a member or officer of a body corporate or joint stock company, the answer is the answer of the body or company (and can be read against it), and on the same principle (see preceding Article), the information of its servants and agents must be

obtained and disclosed, but only that acquired in the course of the employment.

See *infra*, p. 39. *Qu.* as to *Corp. Salford v. Lever* there cited: the solicitor is merely the mouthpiece of the body to give the information of its servants and agents.

19. He must also (see Arts. 16 and 17) examine documents in his possession or power if necessary, and for this purpose a document is in his power if he has an enforceable right to inspect it; but although he can be ordered to disclose the contents or effect of the document he cannot be ordered to produce it if it is not in his sole possession or power (see Art. 33). He is not bound to go and search documents equally accessible to the other party.

See *infra*, p. 47.

20. A further answer may be ordered under rr. 10 and 11 if the answer is deemed insufficient. In considering whether an answer is sufficient, the Court cannot go into its truthfulness except within the limits mentioned in Art. 38.

See *infra*, p. 46.

21. An answer may be insufficient as not complying with Arts. 16—19, or as not substantially answering the questions (whether intentionally or unintentionally), or as being evasive, or as mixing up matter of supererogation so that the answer to the particular question cannot be read without the irrelevant matter: but the party may explain or qualify his answer.

See *infra*, p. 46.

Under r. 24, part of an answer may be read in evidence at the trial.

22. The grounds of objection to answering an interrogatory are those referred to in Art. 41. Unless a further statement of fact is necessary to support the objection, it is not necessary to take the objection in the answer (a). The statements of fact in the answer are conclusive, subject as stated in Art. 38.

(a) See *infra*, p. 40.

Discovery and Production of Documents.

23. A general or limited affidavit of documents in a party's (a) possession or power (see Art. 26) is obtained under rr. 12 and 13 and a further affidavit may be ordered (see Art. 27).

His obligation to ascertain the existence of documents and their nature and effect is the same as if he were answering an interrogatory, that is to say, to the best of his knowledge, information, recollection and belief (*b*), for an affidavit of documents is really in the nature of an answer to an imaginary interrogatory, and discovery of documents was formerly obtained in this way (*c*). The search for and examination of documents need not where it would be unreasonable or impracticable be made by the party himself, but in such a case it should be made by some responsible and competent person, so as to justify the party's assertion of his belief as to the non-existence of other relevant documents in his possession or power, or as to the nature or effect of particular documents in support of a claim to protect them from production (*d*).

(*a*) See Art. 9.

(*b*) See Arts. 16—18.

(*c*) See Bray, p. 151.

(*d*) See Art. 24 as to corporate bodies; Bray, p. 502: and *infra*, p. 49. An affidavit as to specific documents is got under r. 19A, see Art. 29.

24. Where the party is a body corporate or joint stock company the opponent is entitled to have the sanction of the oath of the proper officer that there are no other documents than those comprised in the affidavit; if in any respect he has no personal knowledge, for instance, as to documents abroad, he should under some circumstances disclose his means of information, and if the Court is not satisfied, an order may be made that some person on the spot should make the affidavit.

See Rep. of *Liberia v. Roge*, 1 A. C. 139, Art. 23, and *infra*, p. 40: and as to interrogatories, Art. 18.

25. The affidavit may under some circumstances be ordered to be made by another person on the party's behalf.

See Art. 3 generally, and *infra*, p. 48. "On oath," in rr. 12 and 14, does not necessarily mean the party's oath, see Bray, p. 85.

26. Possession, or power, for the purpose of an affidavit of documents, has a wider signification than for the purpose of production. All documents must be included in which the party has any kind of property, although (see Art. 33) he can only be ordered to produce those of which he is the sole proprietor; also all documents in his corporeal possession, whether he has any property in them or not.

See *infra*, p. 49: and Bray, pp. 224—227.

27. A further affidavit (see Art. 23) may be ordered on the ground that the affidavit is insufficient in form (a), or protection is insufficiently claimed, or that relevant documents are omitted (see next Article).

(a) This includes insufficient search for and examination of documents, see Art. 23; and also insufficient description of documents for the purpose of identification, see *infra*, p. 52.

See generally, *infra*, p. 52.

28. Where the complaint is that relevant documents have been omitted from the affidavit of documents, and the affidavit is sufficient in form (see Art. 27), a further affidavit can only be ordered if there is reasonable ground for suspicion, derived from particular sources (see Art. 39), that there are other relevant documents in the party's possession (a); or a special order as to specific documents may be obtained on an application under r. 19A (see Art 29); or in a very exceptional case an interrogatory might be allowed (b).

(a) See *infra*, p. 50.

(b) See *infra*, p. 51.

29. An order may be obtained, under r. 19A (3), for an affidavit as to specific documents; the application must be supported by an affidavit of possession and relevancy. The affidavit made by the party under the order is equally conclusive as to possession, relevancy, or claim to protection, as any other affidavit of discovery (see Art. 38).

See *infra*, p. 59.

30. Interrogatories as to documents or as to their contents, may, under some circumstances, be legitimate, either to ascertain the existence of specific documents (a), or to get an admission of their contents to be used in evidence (b), or to falsify a claim to protection (c).

(a) See *infra*, p. 44: and after affidavit of documents, Art. 28.

(b) See *infra*, p. 45.

(c) See Art. 40.

31. A party cannot be ordered to produce a document unless he has directly or indirectly (for instance, by failing to deny an allegation to that effect by the applicant under r. 18) admitted (a) its relevancy; but if the nature of its contents or effect is known the Court can judge of its relevancy; and

further, under r. 19A, the Court may inspect the document for the purpose of deciding the question. (See also Art. 38.)

(a) An admission in an affidavit of documents obtained by another party is sufficient, see *infra*, p. 53.

As to relevancy, see Art. 10.

32. Similarly, a party cannot be ordered to produce a document unless he has directly or indirectly admitted that it is in his possession or power. (See also Art. 38.)

33. A party cannot be ordered to produce a document unless it is in his sole legal possession or power; that is to say, unless the sole right and power to deal with it is in him, although he must discover all documents which are in his possession or power at all (see Art. 26). The mere interest of another person in a document is not sufficient to prevent an order for production; it must be an actual property in the document or a right of possession. The party must state the names and nature of the interest of the other persons; he need not allege or show a refusal by them. He may be ordered to disclose the contents (see Art. 19). Where it is in his sole legal possession the order will be made, although it is in the actual possession of a person who will not give it up, and he may have to take proceedings to enforce his right.

The lien of a solicitor is an exceptional case, and does not necessarily prevent an order being made for production (see *infra*, p. 53); the lien of another person is within the general rule, and prevents an order being made (see Bray, p. 205). See generally, *infra*, p. 53, and Bray, pp. 193—209.

34. Production of documents in his possession or power (see Art. 33) may be ordered against a party under rr. 14 or 18. Where the document is not referred to in the pleadings, particulars or affidavits (a) of the party, or disclosed in his affidavits of documents, the application must be supported by an affidavit of possession and relevancy; but if the possession or relevancy is denied or protection is properly claimed by affidavit, it is conclusive, except under the circumstances mentioned in Art. 38.

(a) See (n.) to Art. 66.

35. Notice to produce documents for inspection to which reference is made by a party in his pleadings, or affidavits (a) may be given under rr. 15—17.

(a) See (n.) to Art. 66.

36 Parts of documents may be sealed up, and generally under the same circumstances as a document may be withheld from production.

See *infra*, p. 55.

37. A party who has obtained access to his opponents' documents, under an order for production, has no right to make their contents public, or communicate them to any stranger to the suit, and, if necessary, he may be restrained by injunction.

See Bray, p. 238.

[As to place of production, see *infra*, p. 54; as to taking copies, *infra*, p. 55; as to persons to inspect, *infra*, p. 55; as to production of copies instead of the originals of business books, under r. 19A, *infra*, p. 59].

Objections to Discovery.

38. Where a party is resisting discovery or further discovery, his oath (to the best of his belief, and after proper examination, see Art. 23), whether as to the facts on which his claim to protection is based on the ground of privilege under one of the four heads in Art. 42, or as to relevancy (see Art. 31), or as to possession (see Art. 32) is conclusive, unless the Court is clearly or reasonably satisfied or certain from particular sources (see next Article) that his assertion is untrue or cannot be accepted; mere suspicion derived therefrom is sufficient to justify an order for a further affidavit of documents (see Art. 28), but it does not justify an order for disclosure of the matter he has objected to disclose either by way of further answer or production (but the Court may inspect the document for the purpose of deciding the question under r. 19A).

See *infra*, p. 24.

39. With regard to the sources referred to in the last Article, there is unfortunately some confusion, as they have been differently stated at different times, according to the nature of the discovery required; they do not in any case extend beyond statements made by the party resisting discovery in the cause or matter and documents produced; no statement by the applicant can be regarded for this purpose if denied by the party resisting discovery. It is submitted that

in every case the Court might consider any admission by him in the cause or matter whether by affidavit, pleadings or otherwise, and whether direct or indirect.

See as to the sources, *infra*, p. 25.

40. An interrogatory to falsify the claim to protection for a document is very rarely permissible.

See (n.) to Art. 64.

41 Unless the discovery can be objected to as irrelevant, the only objections as of right are those specified in Art. 42. But there are objections which may be raised and to which the Court in the exercise of the very wide discretionary power which it now has may give effect if it is not clearly satisfied that the discovery is really necessary for fairly disposing of the cause or matter, or for saving costs (see Art. 11), and where there is a preliminary issue the Court may limit the discovery to that issue (see Art. 8).

These objections are referred to, *infra*, pp. 40—45, 50, 53, and they may be applicable both in the case of answers to interrogatories and of production of documents. It may be said as to most of the cases that the question is whether it would not under the circumstances be oppressive to order the discovery.

It may be observed that there is no privilege for the most confidential communications to and from other persons (for instance, a doctor, friend, clergyman) on that ground (and if they are documents they must be produced if they are the party's sole property, even though the other person has stipulated for their being treated as private and confidential, and refuses to authorise their production), or whatever the civil or criminal consequences may be to the other person. If the communication contains privileged matter, it may retain its privilege, see Art. 59.

42. There are four grounds, and four grounds only (see Art. 41), on which discovery may be refused as of right by the party from whom it is sought: on the ground of its incriminatory or penal nature; on the ground of legal professional privilege; on the ground of its disclosing his evidence; and on the ground of injury to public interests.

See *infra*, p. 24.

Incriminatory or Penal.

43. A party is not compelled to give discovery which will tend to criminate him or expose him to the risk of any kind of

punishment (including penal proceedings abroad), whether it be by way of pains, penalties, or forfeitures.

See *infra*, p. 25.

See as to waiver, pardon, statutory exceptions, *infra*, p. 26.

44. The objection to the incriminatory or penal tendency must be taken on oath, whether it be in answer to an interrogatory, or to production of a document, or to discovery of documents, except where the discovery is sought by a plaintiff in an action to recover penalties or to enforce a forfeiture (see Art. 45), and generally speaking the party himself is allowed to be the judge of the tendency.

See *infra*, p. 25.

45. In an action to recover penalties (of a penal nature) or to enforce a forfeiture a plaintiff will not be allowed any discovery required solely to support the claim, and this not on the ground that *nemo tenetur seipsum prodere*, for this objection must be taken on oath (see Art. 44), but because the Courts will not lend their assistance to a plaintiff for that purpose.

See *infra*, p. 26.

Legal Professional Privilege.

46. The object of the privilege is to enable persons to consult and obtain advice and assistance from professional lawyers safely and effectually : whatever is reasonably necessary for this purpose will be protected. The privilege is wider for this reason where litigation is pending or anticipated than where it is not.

See *infra*, p. 27.

See as to waiver and secondary evidence, Art. 59.

There is no privilege for the most private and confidential communications except in connection with legal advice ; see (n.) to Art. 41.

47. No privilege attaches to communications passing for the purpose of contriving a fraud, or for an illegal purpose, or for illegally evading an Act of Parliament, even (*semble*) if the legal adviser is ignorant of the purpose. The fraud or illegality must be definitely and clearly alleged.

See *infra*, p. 28.

48. No privilege can be asserted as against a person on whose behalf (or on the behalf of whose predecessor in title or of the person from whom he claims) the legal advice and assist-

ance has been obtained. A successor in title to or person claiming from or through the client, can assert the client's privilege against a person claiming adversely to the client.

See *infra*, p. 30.

49. Under all circumstances, whether litigation is pending or anticipated or not, confidential communications between the client (or his agent or representative in that behalf (a)) and his professional legal adviser (or his agent or representative in that behalf (a)) for the purpose of obtaining and giving legal advice or assistance are privileged. The privilege covers statements of fact in the communication, but there may be a particular fact which is so unconfidential as to be outside the privilege (b).

(a) See *infra*, p. 30.

(b) See *infra*, p. 29 ; and Arts. 57 and 60.

As to a solicitor acting for both parties in a transaction, see *infra*, p. 29. See generally *infra*, pp. 28—29.

50. A document which has come into existence for the purpose of being communicated by the client to the legal adviser with the object of obtaining his advice or of enabling him either to prosecute or defend an action, and whether in fact communicated or not, is privileged, because it is something done for the purpose of serving as a communication between the client and his legal adviser.

Stated by Cotton, L.J., as the true principle in *Southwark Co. v. Quick* (*infra*, p. 30), where the document in question was the statement of an officer or servant of the company, and made in view of litigation ; but the principle as stated treats the document as a communication from the client to his legal adviser, and so enjoying the same unlimited privilege, see Art. 49. To be within it the document must, it is clear, have come into existence either upon the client's instructions (which would if necessary be protected) or have been prepared for him ; a spontaneous communication from a stranger to the client would not be within it, although such a document would be protected if in reference to litigation, see Art. 53.

51. A person doing the legal adviser's work as his clerk or agent is in the same position as the legal adviser. But the expression "doing his work" must not be understood in the wide sense in which it is sometimes used, so as to cover the case of every person whom the legal adviser requests to obtain or furnish him with information ; for instance, the report of a surveyor : his communications with such a person are only

privileged where the information is required for pending or anticipated litigation (see Art. 53).

See *infra*, p. 30. This decision (*Wheeler v. Le Marchant*) was rested on the ground that the rule did not extend beyond what necessity warranted (see Art. 46). It is conceived that if the communication, whether to or from the third person, disclosed the legal adviser's advice or views it might be protected, see Arts. 58 and 59.

52. (1) So also (see Art. 49) are communications between the different legal advisers, cases for opinion, opinions, drafts, under some circumstances entries in bills of costs, the legal adviser's notes and clients' notes of privileged communications.

See *infra*, p. 29, and Art. 59.

52. (2) So also confidential joint consultations and conferences.

See *infra*, p. 30, and Art. 56.

53. Where litigation is pending or anticipated (see Art. 54) any original (see Art. 58) document which has come into existence or any communication made confidentially for the purpose of obtaining for or furnishing to the legal adviser materials to enable him to conduct or advise his client in reference to the litigation, whether under the actual advice or direction of the legal adviser or spontaneously for that purpose at his implied request or invitation as such legal adviser, or by the client's direction for communication to him, though not in fact communicated, is privileged.

See as to materials for evidence collected by a party who is conducting his own case, Art. 65.

See *infra*, p. 31 (n.), "conditions."

54. (1) The litigation need not be the particular litigation in which the discovery is sought, but may be other litigation with other persons and involving different subject matter or questions, for as a general rule "once privileged always privileged."

54. (2) Litigation is "anticipated" for this purpose if after cause of action arisen or *lis mota* a party makes or calls into existence the communication or document in the *bonâ fide* belief or under a reasonable apprehension that litigation may ensue and solely for that reason: it must be litigation of a

definite character: a mere vague apprehension of litigation generally is not sufficient.

See *infra*, p. 31, and Bray, p. 408.

55. A communication from the client's agent to himself giving information as to the matters in question is privileged if it satisfies the conditions of Art. 53, and where litigation is not pending or anticipated, if it satisfies the conditions of Art. 50: but it should be stated or appear very clearly that it was a special communication made for this purpose, and not the ordinary communication of an agent to his principal. The information may have to be given in answer to interrogatories, see Arts. 17 and 60.

See *infra*, p. 32.

56. Communications between co-plaintiffs or co-defendants, or persons having a common interest, or with or between their respective legal advisers are privileged if they satisfy the conditions of Art. 53, or (Art. 59) if they contained privileged matter (a). Confidential joint consultations and conferences are privileged whether litigation is pending or anticipated or not (b).

(a) See *infra*, p. 32.

(b) See *infra*, p. 30.

57. What passes in open court or at a compulsory arbitration or at chambers is considered *publici juris*, and no privilege can attach to a bare record of what passes there.

See *infra*, p. 29, and Art. 49 as to statements of fact.

58. Documents not originally privileged (or copies of or extracts from them) cannot become privileged in consequence of their being obtained by the legal adviser, but if the effect of producing them would be to show his view as to his client's case or the advice he had given him, they are privileged.

See *infra*, p. 30. This may perhaps apply even where not in reference to litigation.

59. Privileged matter, it is conceived, retains its privilege in whatever document it may be contained if the communication containing it is confidential. Further, the person to whom the privileged matter is confidentially communicated is, it is conceived, entitled and bound to assert the client's privilege.

It can of course be waived by the client, see *infra*, p. 27.

In *Calcraft v. Guest*, cited *infra*, p. 27, the C. A. held that secondary

evidence of privileged documents might be admissible as against the client: they, however, only purported to follow *Lloyd v. Mostyn*, where it was held that where an attorney was confidentially entrusted with a document and could not therefore be compelled to produce it, secondary evidence might be given; but there the document (a bond or deed) was not in itself a privileged document at all, and *qu. Calcraft v. Guest*. In Bray, pp. 207, 366, the author has overlooked the distinction between taking away an existing privilege and creating a privilege; the confidence, of course, creates no privilege, see (n.) to Art. 41.

60. Where a party is interrogated as to a matter upon which his information is derived solely from communications which would be privileged from production on the ground of professional privilege, the information (being confidential (a)) and his belief founded thereon is privileged if the information was obtained by or at the request of the legal adviser: *qu.* if otherwise. He cannot, however, escape the obligation to disclose his own agent's knowledge in answer to interrogatories of the nature referred to in Art. 17.

In *Lyell v. Kennedy*, cited *infra*, p. 33, it was held that the persons who had procured the information must be persons who could be deemed to be agents of the solicitor: the line intended to be drawn was, it is conceived, between information obtained at the solicitor's request and information obtained by the client at his own instance, although (Art. 53) the actual document containing the information would, if the information was obtained for communication to the solicitor, be privileged. There is undoubtedly a distinction: it is necessary that the solicitor should be able to obtain information without the information being disclosed; it is necessary that the client should be able to communicate freely with his solicitor without having to divulge what he said. Cotton, L.J., who was one of the judges in that case, said, in *Young v. Holloway*, 12 P. D., at p. 169, that the plaintiff must give her opponents the benefit of all information she has obtained unless obtained by her for the purpose of being communicated to her solicitor to forward her case, but he was there dealing with the question of production of the document. It should be noted that where litigation is not pending or anticipated, the information obtained by a solicitor *aliunde* is not necessarily protected, see Art. 51.

See generally, *infra*, p. 33.

(a) See *infra*, p. 33, and Arts. 49 and 57: a bare fact may not be confidential.

61. The legal adviser must not disclose what he has learnt confidentially in his professional capacity: nor in any case can he be ordered to produce his client's documents, for they are not his property (see Art. 33).

See *infra* p. 33.

Questions of this kind have generally arisen in the witness-box, and

there the same rule as to production of documents the property of another person does not obtain.

Disclosing the Party's Evidence.

62. A party is not bound to discover the evidence of his case. The reason is that it would enable an unscrupulous opponent to tamper with the witnesses (if it is oral evidence), and to manufacture evidence in contradiction and so shape his case as to defeat justice.

See *infra*, p. 33.

It used to be said that a party was only entitled to discovery relating to his own case. This point is fully discussed in *Bray*, pp. 10—13, and 444. It is sufficient here to say that to state the rule in this form undoubtedly excludes an important province of discovery (see Art. 63) and that the right is to discovery relating to the matters in question, the opponent being protected from disclosing his evidence.

63. He must, in answer to interrogatories, discover the nature of his case (or title to property where it is his case (a)), or the facts on which he relies in support of his case, as distinguished from the evidence of his case, or of the facts, or from the way in which he is going to make out his case, or from the line of facts not being facts directly in issue on which he is going to rely in support of his case or the conduct of his case at the trial; for the opponent is entitled to know what case he has to meet, and also to put him on his oath as to his case; and interrogatories are admissible for the purpose of impeaching or destroying his case. He need not discover the names of his witnesses unless their names form a substantial part of the material facts in the case.

(a) See *infra*, p. 34.

See generally, *infra*, pp. 33—35; and also (n.) to Art. 64 as to production of documents impeaching the party's case.

64. In the case of documents he is allowed to protect himself from producing them by swearing (to the best of his belief, and after proper examination, see Art. 23) that they form, or support, or evidence, or relate exclusively to his own case, and that they contain nothing supporting, or tending to support, the applicant's case, or (but not now, see *infra*) impeaching his own case: and this statement is conclusive unless the Court is reasonably satisfied from certain sources

(see Art. 39) that the party has erroneously represented or misconceived the nature of the documents, or the documents are of such a character that he cannot properly make such an assertion. He need not (having regard to recent decisions) describe the documents or their nature at all, and the privilege therefore covers every kind of document. (The Court may inspect them under r. 19A.)

See generally, *infra*, p. 36.

Some description was necessary, or at all events was given, under the old chancery practice, and the Court was not entirely in the dark as to the nature of the documents, and charges and interrogatories as to the party having specified documents supporting the applicant's case, or as to their containing specified matter supporting his case had to be specifically met and answered, and a general denial was insufficient, see *Bray*, pp. 505, 1214, nor is it clear that the protection originally covered documents which were not in themselves evidence, see *Bray*, pp. 481—492. The result of the recent decisions dispensing with description, and of the recent decisions disallowing in effect interrogatories to falsify the claim for protection (see *infra*, p. 51), is that there is now no check on the general assertions. The decisions dispensing with description originated from omitting to distinguish between the obligation to describe documents sufficiently for identification in the affidavit of documents and the obligation to satisfy the Court that a document ought to be protected from production.

This form of protection, extending as it does now, therefore, to documents of all kinds, whether in themselves evidence or not, and the protection given to materials obtained by or for the legal adviser (see Art. 53), covers the whole ground except the documents referred to in Art. 65.

The denial of impending matter it has now been held is not necessary in any case (see *A.-G. v. Newcastle*, *infra*, p. 36). In that case, Williams, L.J., suggested that it might be that a document impeaching the party's own title ought to be produced if it at the same time supported some affirmative title set up by the opponent, but that where no such affirmative title was set up a party ought not to be compelled to produce a document on which he proposed to rely as supporting his case merely because it contained something which suggested a flaw in his title, and might in that way tend to assist the opponent's case. If, however, the document tends to support the opponent's affirmative title the other assertions could not be truly made, and, therefore, this assertion is not wanted, while if the impeaching matter is a mere weakness or defect of evidence it ought not to entail production whether the opponent sets up an affirmative case or not: the real question is whether the document contains anything tending to support the opponent's case, and if this is specifically denied it is or should be sufficient. Interrogatories may be directed to impeaching the party's own case, and there the suggested impeaching matter being known, the Court can form its own judgment as to whether it is legitimate. In the early chancery cases the difficulty arose where

there was no specific denial of the document containing matter supporting the opponent's case, see *Bray*, pp. 494—498.

65. Documents coming into existence as materials for or relating to evidence to be given orally, where the party is conducting his own case, have never as such been yet expressly held privileged, and the weight of authority is against it. If they can be brought within Article 64 they are, of course, protected.

See *infra*, p. 31. See as to materials obtained by or for a legal adviser, Art. 53.

66. Where a party refers to a document in his pleadings or particulars, or in a voluntary affidavit, that is to say, in an affidavit other than an affidavit of discovery, there is a special obligation to produce it for immediate inspection.

It is believed that this was the object of rule 15 (*infra*, p. 56), under which notice may be given to a party to produce documents referred to in his pleadings or affidavits, and if they are not produced they cannot be given in evidence unless he satisfies the judge that if a defendant, the document relates only to his own title, or he had some other sufficient cause or excuse. "Affidavits," however, has been treated as including affidavits of documents and answers to interrogatories; that is to say, compulsory affidavits, and so construed, the rule may place an obligation on a plaintiff to produce all his own evidences before the trial, which is entirely contrary to equity-principles. The rule, however, has never in practice been pushed to this extent. *Quilter v. Heatley*, cited, *infra*, p. 56, clearly establishes the special obligation referred to in the above Article and the distinction.

Injuries to Public Interests.

67. Public official documents are protected from production if it would be injurious to the public interest. There must be some statement by a responsible person, not apparently on oath, but embodied in an affidavit by the party from whom discovery is sought.

See *infra*, p. 37.

PART II.

NOTES OF PRACTICE.

ORDER XXXI.

DISCOVERY AND INSPECTION.

Summary.

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**Discovery by
interrogatories.**

1. In any cause or matter the plaintiff or defendant by leave of the Court or a Judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the cause or matter shall

be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness. **O. 31, r. 1.**

Cross References.—Leave to deliver the interrogatories, r. 2. Form of interrogatories, r. 4. Objection to, and setting aside, rr. 6, 7. Affidavit in answer to, r. 9. Answer by corporation or company, r. 5. Affidavit to be made within ten days, r. 8. Omission to answer or insufficient answer, rr. 10, 11. Costs of interrogatories, r. 3. Failure to comply with order for discovery, r. 21. Service on solicitor sufficient for attachment, r. 22. If solicitor so served fails to give client notice, he may be attached, r. 23. Premature discovery may be postponed, r. 20. Parts of answers may be used at trial, r. 24. Security for costs discretionary, rr. 25, 26. Disposition of security for costs, rr. 27, 27A. Discovery against sheriff, r. 28. Infants, r. 29.

"In any Cause or Matter."

Petition.—A petition is a cause or matter, and therefore inspection may be had under rr. 15—18 of this order (*Re Credit Co.*, 11 C. D. 256 winding-up petition). A petitioner is a plaintiff, and may interrogate (*Re Haddan's Patent*, 51 L. T. 190; J. A., 1873, s. 100; O. 71, r. 1). Discovery cannot be had in an election petition (*Moore v. Kennard*, 10 Q. B. D. 290, inspection; *Wells v. Wren*, 5 C. P. D. 546, interrogatories; as to documents in custody of returning officer, see *Re Pembroke*, (1908) 2 I. R. 158). As to petitions of right, see (n.) "Crown, A.-G." *infra*.

References and Arbitrations.—As to references to referees, see O. 36, r. 50. Where the action and all matters in dispute have been referred by consent to an arbitrator, it has been held that the action has disappeared, and the Court can make no order for discovery (*Penrice v. Williams*, 23 C. D. 387).

Motion to set aside Award.—Held to be a cause or matter within r. 15 (*Re Fenner & Lord*, (1897) 1 Q. B. 667).

Interpleader.—By O. 57, r. 13, this order applies to interpleader issues.

Actions for Penalties and Forfeitures.—See (n.) *infra*, p. 26.

Inquiry pro interesse suo.—See *Alton v. Harrison*, W. N. (69) 81 (affidavit of documents).

Actions for Recovery of Land.—See (n.) "Title to land," *infra*, p. 34.

Patent and Trade Mark Actions and Applications.—A party is entitled to interrogate in such actions notwithstanding the statutory provision as to particulars (*Birch v. Mather*, 22 C. D. 629; *Crossley v. Tomey*, 2 C. D. 533). Other cases—*Re Wills' Trade Mark*, (1892) 3 Ch. 201 (affidavit of docs. on motion to expunge from register). *Saccharin Corporation v. Anglo Works*, cited *infra*, p. 43. *Benno Yaffe v. Richardson*, 68 L. T. 404.

Libel and Slander Actions.—See (n.) *infra*, p. 43.

Companies.—See r. 5 (nn.), *infra*.

The Crown and the A.-G.—See generally Bray, pp. 68—72. In informations to which O. 31 does not apply the Crown has the same right of discovery against a subject as one subject against another, see *A.-G. v. Newcastle*, (1897) 2 Q. B. 384, discussing generally the Crown's position. In a petition of right the Crown is entitled to discovery of documents (*Tomline v. The Queen*, 4 Ex. D. 252). *Semble*, the suppliant cannot obtain discovery from the Crown (*A.-G. v. Newcastle*); a bill of discovery would not lie in aid of a petition of right (*Reimer v. Salisbury*, 2 C. D., p. 386). Petitioner in divorce suit was refused discovery against King's Proctor in *D. v. D.*, 25 Times Rep. 411.

Foreign States—If a foreign sovereign bring an action here he must give discovery (*S. A. Rep. v. La Comp. Franco Belge*, (1898) 1 Ch. 190),

O. 81, r. 1.

and must give it on his own oath, and not on the oath of an agent on his behalf (*Prielean v. U. S. A.*, L. R. 2 Eq. pp. 663, 664); but foreign republics give discovery by their proper officers (*Rep. Costa Rica v. Erlanger*, 1 C. D. 171; and see r. 5, *infra*, and Article 3, *supra*).

Lunacy.—See (n.) to r. 29, *infra*.

P. D. and A. Div.—This division has by virtue of the J. A., ss. 16 and 23, all the powers of discovery possessed by the old courts of Chancery, Common Law, Admiralty, Probate and Divorce which were absorbed into the High Court of Justice (*Harvey v. Lovekin* and *Euston v. Smith*, *infra*). In divorce and matrimonial causes the rules of the J. A. do not apply (O. 68, r. 1), and the court proceeds upon the principles and rules of the old Ecclesiastical Courts; these courts compelled discovery and this practice has been continued, and discovery both by interrogatories and by affidavit of documents, has been granted as well in matrimonial causes over which the old Ecclesiastical Courts had jurisdiction as in those in which they had not (*Redfern v. R.* and *Harvey v. Lovekin*). Cases: *Redfern v. R.* (see this case explained *infra*, p. 26); *E. v. E.*, 24 Times Rep. 78, interrogatories to prove cruelty not allowed; *Harvey v. Lovekin*, 10 P. D. 122; *Euston v. Smith*, 9 P. D. 57, suit for nullity of marriage; *Young v. Holloway*, 12 P. D. 167, interrogatories in support of charge of undue influence. In collision actions information contained in the Preliminary Acts can be interrogated to under special circumstances (*Isle of Cyprus*, 15 P. D. 134; *The Bernard*, W. N. (1906) 73; *The Biola*, 34 L. T. 185; *The Radnorshire*, 5 P. D. 172).

"Plaintiff or Defendant"—See (nn.) "Opposite parties," *infra*, and "Any party," under r. 12, *infra*.

"By leave of the Court," &c.—See r. 2.

"Deliver Interrogatories."—Interrogatories may be delivered (O. 19, r. 10), or served (O. 67, r. 4), by filing. Where leave is given to serve a writ out of the jurisdiction, leave may also be given to serve interrogatories therewith (*Young v. Brassey*, 1 C. D. 277).

"Opposite Parties."—The words in r. 12 relating to discovery of documents are "any other party," but they have been held to mean any opposite party (*Shaw v. Smith*, 18 Q. B. D. 193; approving *Brown v. Watkins*, 16 Q. B. D. 125).

A party on the other side of the record to the applicants is an opposite party, and he may be ordered to give discovery of documents if he is a necessary party to the action, although there may be no issue or matter in question at all between him and the applicant (*Spokes v. Grosvenor Co.*, (1897) 2 Q. B. 124); see as to the supposed rule that a party was not bound to give discovery relating to matters in question between other parties in the action, r. 6, (n.) "Irrelevant," *infra*.

A party not on the other side of the record is an opposite party within the meaning of these rules if between him and the applicant there is some right to be adjusted in the action, which in chancery actions might often be the case between two plaintiffs or two defendants (*Shaw v. Smith*, *supra*; *Molloy v. Kilby*, 15 C. D. 162; *Alcoy, &c., Co. v. Greenhill*, 74 L. T. 345, where discovery of documents between co-defendants to counterclaim was ordered); and in *Eden v. Weardale Co.*, *infra*, it was said to mean that a plaintiff might interrogate a defendant, and a defendant a plaintiff, and that the definitions of these words in s. 100 of the J. A. were so wide as to include all persons who litigate one against the other in any proceeding any question which the court may properly decide. Defendants were refused leave to interrogate co-defendants who had put in no defence, there being no issue between them (*Marshall v. Langley*, W. N. (1889) 222).

A third party who has obtained an order giving him liberty to appear at the trial and oppose the plaintiff's claim, is in the position of an

opposite party to the plaintiff and of a defendant, and can therefore interrogate the plaintiff (*Eden v. Weardale Co.*, 35 C. D. 287); and the plaintiff can interrogate him (*ibid.* 34 C. D. 223, following *McAllister v. Rochester*, 5 C. P. D. 194, where it was held that in a similar case the plaintiff and third party must give discovery of documents to one another). See also *Bates v. Burchell*, W. N. (1884) 108, where a third party obtained leave to interrogate the defendant.

O. 31, r. 1.

See also (n.) "Any party" under r. 12, *infra*.

"Irrelevant notwithstanding admissible on Cross-Examination."—See r. 6, (n.) "Irrelevant," *infra*.

Time or Stage for Discovery.—In the K. B. D. discovery is not generally granted until after defence. In the C. D. in some chambers apparently it is every-day practice to allow a plaintiff discovery before defence, and see *Union Bank v. Manby*, 13 C. D. 239, redemption action, explaining *Hancock v. Guerin*, 4 Ex. D. 3; *Harbord v. Monk*, 9 C. D. 616; and *Augustinus v. Nerinckx*, 16 C. D. 13.

A plaintiff will hardly ever be allowed discovery before statement of claim. From the earliest times the courts have set their faces against allowing discovery for the purpose of fishing out a case; see, for instance, (n.) "Title to land," p. 34, *infra*. Leave might be given to interrogate as to (*Philipps v. P.*, 40 L. T. p. 822), or production might be ordered of (*Magnus v. Plumbers Co.*, *supra*, O. 30, and *Cashin v. Craddock*, 2 C. D. 147), a particular document; but as a rule no general discovery (*ibid.* and *Rep. Costa Rica v. Strousberg*, 11 C. D. 323).

For the same reasons a defendant is, as a rule, not allowed general discovery before putting in his defence (*Disney v. Longbourne*, 2 C. D. 704; *Egremont Burial Bd. v. Egremont Co.*, 14 C. D. 158); for the purpose of finding out if he has a defence (*Zierenberg v. Labouchere*, (1893) 2 Q. B. p. 188, explained in *Waynes, &c. Co. v. Radford & Co.*, (1896) 1 Ch. 29). In *Hawley v. Reade*, W. N. (1876) 64, action upon a bill of exchange, defendant was allowed to interrogate as to the consideration to know whether he should defend the action, but *qu.*; and see r. 7, (n.) "Paying Money into Court."

Where documents are referred to in the statement of claim, the defendant is, unless they are privileged, entitled to inspect them before he puts in his defence: see r. 15, (n.) "Scope and Object of this Rule."

As to discovery for the purpose of giving particulars, see O. 19, r. 7 (n.); and (n.) "Libel Actions," p. 43, *infra*.

In the Admiralty Division it is the usual practice to allow a plaintiff discovery after statement of claim, and a defendant after defence (*Roscoe's Adm. Pr.* p. 340). In *The Murillo*, 28 L. T. 374, plaintiff interrogated before petition filed.

At the Trial.—The judge at the trial may order production (*MacAlpine v. Calder*, (1893) 1 Q. B. 550).

Discovery after and for Working out Judgment or Order.—Discovery after judgment is only permissible for working it out (*Poisson v. Robertson*, 50 W. R. 260). The words "during the pendency" in r. 14 mean "up to judgment." O. 55, r. 16, gives the Master powers to order discovery in proceedings before him. See as to discovery after judgment in C. D., *Bray*, pp. 567—569. Interrogatories are rarely, if ever, allowed. Inspection has been ordered and also discovery of documents on inquiries as to damages or profits (*Ladds v. Walthew*, 32 W. R. 1000; *Maxim Nordenfeldt v. N.*, (1893) 3 Ch. 122; *Hennessey v. Lavery*, (1903) 1 I. R. 87; *Saccharin Corporation v. Anglo Works*, *supra*).

Discovery in aid of execution is provided for by O. 42, rr. 32—34.

Appeals.—Where the judgment in a K. B. action is appealed from discovery can only be ordered, if at all, by the C. A.: so held by

O. 31, r. 1.

Bucknill, J., in *Hirschfield v. Simpson* (unreported) 3 May, 1910. On an appeal from an application to strike out a contributory there is jurisdiction in the C. A. to order discovery of documents for the purpose of the appeal (*Re National Funds Co.*, 24 W. R. 774).

Effect of J. A. and Rules on the Right to and Practice of Discovery.—The questions (of practice not of principle) are governed by the rules of the J. A. (see *Bolckow v. Fisher*, 10 Q. B. D. p. 168; *Jones v. Montevideo Gas Co.*, 5 Q. B. D. p. 558; *Kearsley v. Phillips*, 10 Q. B. D. p. 466; *Aste v. Stumore*, 13 Q. B. D. pp. 329, 330). Where no provision is made by the Act or rules the old procedure and practice remains in force (O. 72, r. 2, and *Wilson v. Church*, 9 C. D. 552), and not only the Chancery procedure and practice (*A.-G. v. Gaskill*, 20 C. D. pp. 525, 526, 530), but also the Common Law procedure and practice where it does not conflict with that in Chancery (*Anderson v. Bank of Columbia*, 2 C. D. p. 654, and *Brown v. Liell*, cited under r. 18). The right to discovery is conferred in affirmative terms and in such manner as not to exclude all other modes of discovery . . . a very large body of practice was left unprovided for by the rules (*Jessel, M.R., China Co. v. Commercial Co.*, 8 Q. B. D. p. 145). Where there is any conflict or variance between the rules of Common Law and Equity with reference to the same matter, the rules of Equity are to prevail (*Bustros v. White*, 1 Q. B. D. p. 426; *Anderson v. Bank of Columbia*, 2 C. D. pp. 654, 658; *Bolckow v. Fisher*, 10 Q. B. D. p. 166, citing *J. A.*, s. 25, sub-s. 11); and by rules are meant rather rules of law or principles than rules of practice (see *Kearsley v. Phillips*, 10 Q. B. D. 466). But in applying the same rules to both divisions of the High Court, the different natures of Chancery and Common Law actions will be taken into account (*A.-G. v. Gaskill*, 20 C. D. p. 530; *Mercier v. Cotton*, 1 Q. B. D. 442). "Discovery is matter of remedy and not matter of right" (*Emmerson v. Ind, Coope*, 12 App. Cas. p. 309).

The right to all relevant discovery has now, however, been curtailed by the provisions referred to in the next note.

GROUND ON WHICH DISCOVERY CAN BE RESISTED.

The rules now provide that discovery is not to be ordered when and so far as the Court or Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs: see rr. 2, 12 and 18, and see rr. 6 and 7, and the notes thereto, as to oppressive or unnecessary discovery. But in addition to this protection there are four grounds upon which it can be resisted as of right, (a) as being criminatory or penal, (b) as being within the doctrine of legal professional privilege, (c) as disclosing the party's evidence, (d) as being injurious to public interests (Article 42, *supra*). The old equity rule protecting a defendant who pleaded purchase for value without notice from all discovery in aid of a common law action against him, except such as bore upon the issue of notice, does not operate under the Jud. Act so as to entitle him to refuse discovery in an action brought against him in the High Court where such a plea would be no defence to the relief (*Emmerson v. Ind, Coope*, 12 App. Cas. p. 307).

Conclusiveness of Claim to Protection.—As to interrogating to falsify claim, see note on p. 51. The oath of the party as to the facts (see *Gardner v. Irvin*, cited r. 13, (n.) "Sufficient description," *infra*) on which his claim to protection is based and as to the nature and even the effect of documents which he objects to produce, whether as falling under some one of the four heads of privilege above mentioned, or as being irrelevant, or as not in his possession or power, is conclusive, unless the

court is reasonably or clearly satisfied or reasonably certain from particular sources (discussed *infra*) that his assertion is untrue or cannot be accepted : mere suspicion derived therefrom, though sufficient to justify an order for a further affidavit of documents, does not justify an order for disclosure of the matter he has objected to disclose, either by way of further answer or production ; see as to ordering a further answer, r. 11, (n.) "Answers insufficiently," *infra*, p. 46 : as to the production of a document sworn to evidence the party's own case, (n.) "Conclusiveness of claim," *infra*, p. 36 ; as to the production of an irrelevant document, (n.) "Conclusiveness of affidavit," *infra*, p. 50 ; as to ordering a further affidavit of documents, (n.) "Upon application for further affidavit," *infra*, p. 50. For this purpose the Court cannot regard his opponent's oath : the general rule in all questions of discovery is that where you have the oath of the party claiming discovery challenging the oath of the party giving discovery, the oath of the latter is for this purpose conclusive, Cotton, L.J., in *Lyell v. Kennedy*, 27 C. D. p. 19. It is not, however, very clear to what sources the Court is limited. For the purpose of considering whether a further affidavit of documents should be ordered, the affidavit of documents, the documents therein referred to (any documents produced, *Lyell v. Kennedy*, 27 C. D. p. 20), and the pleadings are, according to *Jones v. Montevideo Co.*, 5 Q. B. D. p. 558, *Comp. Financ. v. Peruvian Co.*, 11 Q. B. D. p. 63, and *Hall v. Truman*, 29 C. D. p. 319, the only sources : for the purpose of considering whether a document should be produced for which protection is claimed in an affidavit of documents as evidencing the party's own case, the Court may, according to *A.-G. v. Emerson*, 10 Q. B. D. pp. 198, 204, 206, consider other admissions of the party, the description given by him of the documents and their nature, and other documents produced to the Court, and in this case the party's answers to interrogatories were looked at : for the purpose of considering a claim to protection in answers to interrogatories, Cotton, L.J., in *Lyell v. Kennedy*, 27 C. D. p. 22, refused to say whether the Court could look at anything in the party's possession not referred to in his answer but scheduled to his affidavit of documents. There seems to be no reason why under the present practice the sources should differ in any of these cases ; and it is submitted that it would be in accordance with the spirit of the old chancery practice that the Court should be entitled to look generally at any admission of the party in the action, whether by affidavit, pleadings, or otherwise : see Lindley, L.J., in *Morris v. Edwards*, 23 Q. B. D. p. 293, taking the same view : and see the cases cited, *Bray*, p. 215 (n.).

Examination of Documents.—See r. 12, (n.) "Possession or power."

(a) CRIMINATORY OR PENAL.

A Party is not Compelled to give Discovery which will tend to Criminate him or expose him to the Risk of any kind of Punishment, whether it be by way of Pains, Penalties or Forfeiture. See, for instance, *Redfern v. R.*, *infra*, where it was held that adultery as an ecclesiastical offence was still within this rule : so maintenance in *Alabaster v. Harness*, (1895) 1 Q. B. 339 ; 70 L. T. 375 ; and other cases, *Bray*, p. 311 : see also cases under (n.) "Actions for penalties," *infra*.

The Objection must be taken on Oath.—Where the objection is to an interrogatory, it cannot be disallowed or struck out (but otherwise in actions for penalties or forfeitures, see (n.) "Actions for penalties," *infra*) ; but the objection must be taken in the answer (*Spokes v. Grosvenor Co.*, *infra* ; *Allhusen v. Labouchere*, 3 Q. B. D. 654 ; *Fisher v. Owen*, 8 C. D.

O. 31, r. 1. 645, disapproving *Atherley v. Harvey*, 2 Q. B. D. 524, action for libel where interrogatories asking defendant in effect whether he published the libel were struck out; *Harvey v. Lovekin*, 10 P. D. 122; see also the cases cited (n.) "Libel actions," *infra*, p. 43; and *Lamb v. Munster, infra*. The rule is the same for discovery of documents as of facts: the order will be made (except in the actions referred to above) and the objection must be taken in the affidavit of discovery (*Spokes v. Grosvenor Co.*, (1897) 2 Q. B. 124, 133; approved in *National Association v. Smithies*, (1906) A. C. 434). So on an application for inspection, the objection must be made on oath: in *Webb v. East*, 5 Ex. D. 108, the Court refused to decide whether a party could decline to produce a document as tending to criminate him, but there is ample authority, see *Bray*, p. 315, and in *Spokes v. Grosvenor Co.*, the right seems to have been assumed. *Redfern v. R.*, (1891) P. 139, husband's suit for divorce, where an affidavit of documents required solely to prove adultery was refused, must not (it was said in *Spokes v. Grosvenor Co.*) be taken as an authority on the general law, and was an exceptional case.

Tendency to criminate.—It is sufficient if the party swears that he believes the discovery would tend to criminate him, and in cases where the probability or likelihood of its having such a tendency is apparent to the judge the exact form of words "will," "would," "may," "might," "I think it may," "I believe it will," "I am advised it will," is not material (*Lamb v. Munster*, 10 Q. B. D. pp. 111, 114 (interrogatories by plaintiff in libel action)). See also *Bray*, 321—328, generally as to discovery having a possible tendency to criminate. Where discovery is required by a plaintiff in a proceeding to obtain a judgment or order, disobedience to which would render the defendant liable to a penalty, the defendant cannot avoid discovery as being a step towards exposing him to a penalty, nor is it a penal proceeding (*Derby Corp. v. Derby C. C.*, (1897) A. C. 550).

Penal Proceedings Abroad.—The protection extends to these (*U. S. A. v. Macrae*, L. R. 3 Ch. 79).

Waiver, Pardon, &c.—If the penalty or forfeiture can be and is waived, or if the offence has been pardoned, or if the time for recovering the penalty has expired, the discovery must be given (see, for instance, *A.-G. v. Cunard Co.*, 4 Times Rep. 177).

Exceptions by Statute.—In some cases it has been provided by statute that the liability to criminal prosecution shall not constitute an objection to giving the discovery in civil proceedings, for instance, libels in newspapers (*Ramsden v. Brearley*, 33 L. T. 322; *Lefroy v. Burnside*, 41 L. T. 199).

Actions for Penalties or to enforce Forfeitures.—It appears now to be clearly established by the following cases that in an action to recover a penalty (of a penal nature), or to enforce a forfeiture such as the forfeiture of a lease for breach of covenant, the plaintiff will not be allowed discovery of any kind relating to that issue; and this not on the ground that "nemo tenetur seipsum prodere," for that is an objection which must be taken on oath, as stated above, but because the Courts refused to lend their assistance to a plaintiff for such a purpose.

In *Mexborough v. Whitwood*, (1897) 2 Q. B. 111, an action to enforce the forfeiture of a lease, and the only issue being that of forfeiture, the C. A. upon this ground refused the plaintiff not only leave to interrogate but also discovery of documents, there being no distinction for this purpose between the two sorts of discovery, overruling *Seaward v. Dunnington*, 44 W. R. 696. In actions for statutory penalties imposed by way of punishment as opposed to actions for penalties imposed as compensation to the plaintiff (*Adams v. Batley* and *Cole v. Francis*, 18 Q. B. D. 625, p. 629, actions for penalties under Copyright Act; and see *Derby Corp. v. Derby C. C.*, *supra*, and *Hobbs v. Hudson, infra*), interrogatories by a plaintiff put solely (see *infra*) for the

purpose of proving the plaintiff's right to the penalties will be disallowed under the new rule 2, and the defendant will not be put to make the objection on oath in his answer (*Martin v. Treacher*, 16 Q. B. D. 507, action for penalties by common informer, approving *Hunnings v. Williamson*, 10 Q. B. D. 459, action for penalties under Metrop. Act, 1855, s. 54; *Hobbs v. Hudson*, *infra*; and see *Saunders v. Wiel*, (1892) 2 Q. B. 18, 321, action for penalties under Patents and Trade Marks Act, 1883, now P. and D. Act, 1907); nor will he be allowed discovery of documents (*Hunnings v. Williamson*, *supra*; *Whiteley v. Barley*, 56 L. J. Q. B. 312, and *Jones v. Jones*, 22 Q. B. D. 425, action for pound breach and rescue of distrained chattels, there being no distinction between a penal action by an informer and a penal action by any other person, *ibid.*, approved in *Hobbs v. Hudson*, 25 Q. B. D. 232, action for double value of goods carried off to avoid distress). But where the action is not merely for penalties but is to establish a civil right, interrogatories of this nature may be allowed or disallowed according to the circumstances (see Lindley, L.J., in *Martin v. Treacher*, *supra*), if also relevant to the establishment of the civil right: and so no doubt discovery of documents: the party being of course at liberty to take the objection on oath in the answer or affidavit.

Bankruptcy proceedings are of a penal nature, and therefore discovery cannot be had in support of a bankruptcy petition (*Re A Debtor*, (1910) 2 K. B. 59, C. A.).

(b) LEGAL PROFESSIONAL PRIVILEGE.

The Reasons and General Scope of and Persons within it.—Professional legal advice and assistance is at times essential in the interests of justice, and without the existence of some protection it could not be obtained safely or effectually; but the privilege does not extend beyond what is reasonably necessary for that purpose: see *R. v. Bullivant*, (1901) A. C. p. 200; *Re Strachan*, (1895) 1 Ch. p. 444, C. A.; *Kennedy v. Lyell*, 9 A. C. p. 86; *Southwark Co. v. Quick*, 3 K. B. D. p. 317; *Wheeler v. Le Marchant*, 17 C. D. p. 681; and *Russell v. Jackson*, 9 Ha. p. 391. It does not exist in respect of any person except a legal professional agent (and persons acting for such agent or under his directions), not a pursuivant of the Heralds' College (*Slade v. Tucker*, 14 C. D. p. 827), not a patent agent (*Moseley v. Victoria Co.*, *infra*, p. 29), nor any other persons in a confidential relationship, not, for instance, a medical man or clergyman (*Russell v. Jackson*, *infra*), and see *Jones v. G. C. R. Co.*, *infra*, p. 32, and r. 7, (n.) "Oppressive."

Secondary Evidence.—*Qu.* as to *Calcraft v. Guest*, (1898) 1 Q. B. 759, where it was held that secondary evidence might be given of documents for which the other side have claimed privilege, see Article 59, *supra*.

Waiver.—It can be waived (*Calcraft v. Guest*, *supra*, and *Goldstone v. Williams*, (1899) 1 Ch. p. 52); but it is the privilege of the client and not of the adviser (*Anderson v. Bank of Columbia*, 2 C. D. p. 649; *Procter v. Smiles*, 55 L. J. Q. B. 527). The adviser, therefore, is bound to claim the privilege, unless the client has waived it (*Procter v. Smiles*). Nor does a waiver as to part necessarily involve a waiver as to the whole (*ibid.*, and see *Lyell v. Kennedy*, 27 C. D. p. 24). See further as to waiver, *Bray*, p. 425, and also (n.) "Unprivileged Communications," *infra*, p. 30.

Fraudulent Purpose.—The privilege does not attach to communications passing for the purpose of contriving a fraud (or for an illegal

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purpose, *Russell v. Jackson*, 9 Ha. 392, or for illegally evading an Act of Parliament, *R. v. Bullivant*, (1901) A. C. 196, when the adviser is a party to the contemplated fraud (*Russell v. Jackson*; *Follett v. Jeffreys*, 1 Sim. N. S. 3; *Postlethwaite v. Rickman*, *infra*); and *semble* even when he is not a party to it but is ignorant of the purpose for which his advice is wanted: see *R. v. Cox*, 14 Q. B. D. 153, where this was expressly decided in the case of a criminal purpose: and in *Williams v. Quebrada R. Co.*, (1895) 2 Ch. 751, Kekewich, J., held that the decision in *R. v. Cox* covered as well a civil fraud as a crime. The fraud must be (definitely, *R. v. Bullivant*) alleged on the pleadings (*Postlethwaite v. Rickman*, 35 C. D. 722): nor does it necessarily avail to deny the fraud, for if it were admitted the discovery would not be required, see *R. v. Bullivant*. In *Lambart v. Lambart*, 51 Sol. Jo. 345, a letter from petitioner to her solicitor was held not privileged in an intervention by King's Proctor.

Persons claiming under client, trustee and cestui que trust, &c.—Persons claiming under a deceased client can assert the privilege as against those claiming adversely to the client, but not as against others also claiming under the client (*R. v. Bullivant*, (1901) A. C. p. 206), and see generally as to successors in title, Bray, 385—388. A *cestui que* trust is entitled to see cases and opinions submitted and taken by the trustee for the purpose of the administration of the trust; but where stated and taken by the trustees not for that purpose, but for the purpose of their own defence in litigation against themselves by the *cestui que* trusts, they are protected (*Wynne v. Humberston*, 27 Beav. 421; *Talbot v. Marshfield*, 2 Dr. & Sm. 549; *Mason v. Cattley*, 22 C. D. 609; *Postlethwaite v. Rickman*, 35 C. D. 722). On the same principle a ratepayer would be entitled to see cases and opinions taken by the corporation on the subject of the rates (see *Corp. Bristol v. Cox*, 26 C. D. p. 683); and so in *Gouraud v. Edison Co.*, 57 L. J. Ch. 498, an action by shareholders against the company, the plaintiffs were held entitled to see communications between the company and their solicitors. See other instances of relationships conferring similar rights, Bray, 378—388, 271; and r. 14, (n.) "Documents in which Applicant has a Property."

Description of Documents.—See r. 13, (n.) *infra*.

The Privilege which equally obtains whether Litigation is pending or anticipated or not.

Communications passing directly between the Party and his Legal Professional Adviser.—These are privileged whether they pass in reference to pending or anticipated litigation or not (*Minet v. Morgan*, L. R. 8 Ch. 361; *Mostyn v. West Mostyn Co.*, 34 L. T. 531; *Wheeler v. Le Marchant*, 17 C. D. p. 682, explained in *R. v. Bullivant*, (1900) 2 Q. B. p. 168; and see *Eadie v. Addison*, 31 W. R. 320; *Lowden v. Blakey*, *infra*; and *Pearce v. Foster*, 15 Q. B. D. 114). The law has only gradually reached this broad and reasonable footing (Ld. Selborne in *Minet v. Morgan*, L. R. 8 Ch. p. 366).

It is not every communication between a client and his legal adviser that is protected (*Gardner v. Irvin*, 4 Ex. D. p. 53). They must be professional communications between them of a confidential character for the purpose of getting legal advice (*ibid.*, approved in *O'Shea v. Wood*, (1891) P. 286, and *R. v. Bullivant*, (1900) 2 Q. B. p. 168), communications with the solicitor in that character and for that purpose (*Wheeler v. Le Marchant*, 17 C. D. pp. 682, 683); professional communications passing in a professional capacity (*Minet v. Morgan*, L. R. 8 Ch. p. 368). As to what are professional communications or communications for the purpose of getting legal advice, see Bray, pp. 372—7. Where the solicitor acts also in another capacity, for instance as patent agent, the communications with him in that capacity are not privileged, and in claiming privilege

must be distinguished (*Moseley v. Victoria Co.*, 55 L. T. 482). Where a solicitor acts for both parties in a transaction a communication between one of them and the solicitor, as his solicitor, if confidential, should be privileged: see *Eadie v. Addison*, 31 W. R. 320, and *Macfarlane v. Rolt*, L. R. 14 Eq. 550.

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Statements of Fact.—The privilege attaching to communications from the legal adviser to his client is not confined to actual legal advice, but includes statements therein of facts, see *Bray*, p. 372, and *Ainsworth v. Wilding*, (1900) 2 Ch. 315. But a note or memorandum by the solicitor of a fact if it is unconfidential, such as what passed in chambers, is not necessarily privileged, *ibid.* cited under (n.) "*Publici juris*," *infra*, and see (n.) "*Memoranda, etc.*," *infra*. So also an unconfidential fact might have to be disclosed in answer to interrogatories although communicated by a privileged document, see (n.) "*Privileged information*," *infra*, p. 33. As to notes by client, see (n.) *infra*. His statements of fact to the legal adviser are, of course, privileged, see next note.

Memoranda or Notes of Client or Solicitor, Counsel's Opinions, Bills of Costs, Drafts, etc.—Memoranda or minutes made by the client of the communications between himself and the solicitor are clearly privileged (see, for instance, *Woolley v. N. L. R. Co.*, L. R. 4 C. P. 604); and see generally (n.) "*Unprivileged Communications*," *infra*: but *qu.* as to memoranda or minutes of a committee of a corporation relating to pending or anticipated litigation, which were held privileged in *Corp. Bristol v. Cox*, cited *infra*, p. 32, (n.) "*Communications between co-plaintiffs*." A statement of facts drawn up by the client or by his direction for submission to his solicitor is equally privileged with the communication from the client to the solicitor (see *Southwark Co. v. Quick*, cited *infra*, (n.) "*Communications, etc., by a Third Person*"). A draft advertisement submitted by a party for the approval of his counsel was held privileged in a libel action subsequently brought against him upon the advertisement as published (*Lowden v. Blakey*, 23 Q. B. D. 332). Entries in the solicitor's diary of communications between himself and his client are privileged (*Ward v. Marshall*, 3 Times Rep. 578); and so other notes of solicitors (but not necessarily a note of an unprivileged communication or of a matter of fact, see (n.) "*Statements of Fact*," *supra*); and communications between the different professional advisers, and counsel's drafts and notes, &c. (see *Bray*, 395—397); and bills of costs (but see *Ainsworth v. Wilding*, *infra*), and *qu.* as to *Burton v. Dodd*, 35 Sol. Jo. 39, where production was ordered as it might show whether the client had independent advice, for the privilege obtains however material the disclosure.

Publici juris.—What passes in open court or at a compulsory arbitration or at chambers, or a deposition taken before an examiner and filed (not a deposition under the Bank. or Comp. Acts (*Leahey v. Halifax Co.*, (1893) 1 Ch. 686, and *N. Australian Co. v. Goldsborough*, (1893) 2 Ch. 381, and see *The Palermo*, *infra*), is, generally speaking, *publici juris*, and therefore no privilege can attach to transcripts of evidence in a previous litigation (*Rawstone v. Corp. of Preston*, 30 C. D. 116; *Robson v. Worswick*, 38 C. D. 370; *Nicholl v. Jones*, 2 H. & M. 588; and *qu. Nordon v. Defries*, 8 Q. B. D. 508), nor to entries in a bill of costs which were mere notes by the solicitor of what had taken place in chambers in a hostile litigation (*Ainsworth v. Wilding*, (1900) 2 Ch. 315, and see (n.) "*Statements of Fact*," *supra*), nor to a copy of the deposition (*Goldstone v. Williams*, (1899) 1 Ch. 47); nor does the fact that the solicitor has obtained it make any difference, see (n.) "*Pre-existing documents*," *infra*. But a privileged document, for instance a statement of accounts made out by an accountant under instructions from a solicitor for the purpose of litigation, does not become

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publici juris and lose its privilege merely because it has been produced to the witness in a litigation subsequently compromised, and is an exhibit to the witness's deposition (*Goldstone v. Williams, supra*); and see (n.) "Unprivileged Communications," *infra*.

Pre-existing Documents or Copies of or Extracts therefrom.—These do not necessarily, it is obvious, become privileged by being obtained or made for privileged purposes (see, for instance, *Chadwick v. Bowman*, 16 Q. B. D. 561; *Pearce v. Foster*, 15 Q. B. D. p. 119; *Land Corp. v. Puleston*, W. N. (1884) 1); but where they have been obtained or made by the solicitor or by the client or any other person under the direction of the solicitor, and the effect of producing them would be to show the view of the solicitor as to his client's case, or the advice which he had given him, they are privileged (*Lyell v. Kennedy*, 27 C. D. 1, where it was in reference to litigation, and *qu.* whether not also without, see (n.) "Privileged Information," *infra*). In *The Palermo*, 9 P. D. 6, copies, obtained by plaintiff's solicitors, of depositions of the master and crew under the Merchant Shipping Act, were held privileged, but *qu.*; however in practice such depositions are disclosed when both parties have made them.

Privileged Information.—See (n.), p. 33, *infra*.

Unprivileged Communications containing Privileged Matter.—As a general rule it is conceived that if the communication is confidential the privileged matter retains its privilege and the communication is protected to that extent: see Article 59, *supra*: see also (nn.) "*Publici juris*," and "Waiver," *supra*.

Joint Consultations or Conferences.—These are privileged (*Roche-foucauld v. B.*, *infra*, p. 32), if confidential, see (n.) "Confidential," *infra*.

Communications and Documents made by or to or prepared by a Third Person.—Where the third person is only the medium of communication between the client and the solicitor, that is to say, where he is only the agent or representative of either to make or receive the particular communication, the privilege is co-extensive with that which obtains where the communication passes directly (see *Wheeler v. Le Marchant*, 17 C. D. pp. 682, 684; *Anderson v. Bank of Columbia*, 2 C. D. pp. 648, 649, 658; and *Bray*, 397—401): not therefore where it is made by the party to the third person to consider and act on it (*Jones v. G. C. R.*, *infra*, p. 32). So a document prepared for the client by a third person, whether his agent or not, for communication by the client to his solicitor, even if not communicated, the true rule being that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose of serving as a communication between the client and his solicitor; see *Southwark v. Quick*, 3 Q. B. D. p. 322, where, however, the document had been prepared in view of litigation, but it is thought to be not so limited, see as to this and generally, Articles 50 and 55, *supra*.

Again, a third person may be doing the solicitor's work so as to stand in the position of the solicitor and enjoy his privilege (see *Lyell v. Kennedy*, 27 C. D. pp. 19, 26, referring to *Walsham v. Stainton*; *Anderson v. Bank of Columbia*, 2 C. D., p. 650; and *Bray*, 401, 402); but the expression "doing the solicitor's work" must not be understood in the wide sense in which it is sometimes used as including information obtained or reports made by a third person (for instance a surveyor) for or to the solicitor by his direction; there the privilege only attaches where the work is done in reference to litigation (see *Wheeler v. Le Marchant*, 17 C. D. 675, note *infra*, and Article 51, *supra*).

The Privilege obtaining only if Litigation pending or anticipated. O. 31, r. 1.

[See as to the client's and legal adviser's information and belief (n.) "Privileged Information," *infra*, p. 33.]

Where the communication or document has been made by or to, or prepared by, some person other than the client or one of his legal professional advisers, and other than the persons and under the circumstances mentioned in the (n.) "Communications . . . Third Person," *supra*, it is not privileged unless so made or prepared in reference to pending or anticipated litigation and under the conditions laid down in the note "Conditions of above Privilege," *infra*.

Anticipated Litigation.—A mere vague apprehension of litigation generally is not sufficient, but if a person after cause of action arisen or *lis mota* makes or calls into existence a communication or document in the *bonâ-fide* belief that litigation may ensue and solely for that reason, such a communication or document, if it falls within the conditions stated in the next note, is privileged: see *Collins v. London G. O. Co.*, 68 L. T. 831 (reasonable apprehension of action or claim): and *Corp. Bristol v. Cox*, 26 C. D. p. 683 (*lis mota*): and *Westinghouse v. Midland R. Co.*, 48 L. T. 462, and *Cook v. Metrop. Tram. Co.*, 6 Times Rep. 22, where the servants' reports were not protected. See also as to depositions taken under the Companies and Bankruptcy Acts, *Learoyd v. Halifax Co.* (1893), 1 Ch. 686, and *North Australian Co. v. Goldsborough* (1893), 2 Ch. 381.

The Litigation.—This need not be the litigation in which the discovery is being sought, but may be other litigation, either with the same or other persons, and either involving the same or different subject matter or questions, for as a general rule "once privileged always privileged," see Lindley, M.R., in *Calcraft v. Guest*, (1898) 1 Q. B. p. 761; *Goldstone v. Williams*, *supra*, (n.) "Publici juris"; Bray, p. 409, discussing *Pearce v. Foster*, 15 Q. B. D. 114; *Bullock v. Corrie*, 3 Q. B. D. 356; *Nordon v. Defries*, 8 Q. B. D. 508, and other cases.

Conditions of above Privilege.—In order (the cases in support are all cited *infra*) to bring a document or communication within this privilege it *must* (unless obtained, or, if a copy or extract, made, under the circumstances discussed under (n.) "Pre-existing Documents, Copies, &c.," *supra*, have come into existence or been made confidentially (see (n.) *infra*) for the purpose of obtaining for or furnishing to the solicitor evidence to be used in the (see preceding para.) litigation, or information which might lead to the obtaining of such evidence or information as to the evidence which could be obtained or otherwise for the use of the solicitor to enable him to conduct or advise his client whether to prosecute or defend the (see preceding para.) litigation, or otherwise advise his client in reference thereto: and this whether under the actual advice or direction of the solicitor, or at his implied request or invitation (that is to say spontaneously sent or made to or for him as the solicitor), or by the client's direction for the purpose of communication to the solicitor though not at the solicitor's request and though not in fact communicated to him. It is not necessary to state "solely" in the affidavit, but it may be advisable to do so in the case of reports from agents to their principals, see (n.), *infra*.

Confidential.—For instance, the statement of a plaintiff taken down by defendant's agent before action cannot be confidential or secret as against the plaintiff, and is obviously not privileged (*Tobakin v. Dublin Tram. Co.*, (1905) 2 I. R. 58). See also *Fvakes v. Webb* and *Lyell v. K.* cited in (n.) "Privileged Information," in this connection, *infra*, p. 33.

Materials for Evidence.—It is conceived that on principle (see (n.) "Disclosing Party's Evidence," *infra*), documents come into existence or communications made for the purpose of getting evidence ought to

O. 31, r. 1. be protected independently of its having been done under the direction of or for communication to the solicitor so as to come within the above conditions, for instance, where a party is conducting his own case: but the weight of authority is against it: see *Bray*, pp. 407, 408, 410, 411; *Jones v. G. C. R. Co.*, and *Young v. Holloway*, *infra*; *Kyshe v. Holt*, *W. N.* (1888) 128, affirmed, the *O. A.* not believing the affidavit.

Communications from Agents.—Where the communication is to the party from his agent giving information of the facts and circumstances of the transaction in question, there, inasmuch as the principal is bound to disclose and even obtain his agent's information, such a communication is *prima facie* liable to production; but if it appears that it was not the ordinary report of an agent to his principal, but a special report satisfying the above conditions, it is equally privileged with a communication from a stranger: see *Anderson v. Bank of Columbia*, *infra*, and *Collins v. L. G. O. Co.*, and other cases under (n.) "Anticipated Litigation," *supra*; and under some circumstances even when not in view of litigation see (n.) "Communications, etc. . . . Third Person," *supra*, citing *Southwark Co. v. Quick*. The information may have to be given in answer to interrogatories: see r. 11, (n.) "Information of Agents," *infra*.

Communications Between Co-defendants or Co-plaintiffs or Persons having a common interest or with or between their respective Legal Advisers.—These are protected only if they fall within the above conditions: see *Hutt v. Haileybury*, 4 Times Rep. 277, and *Roche-foucauld v. Boustead*, 65 L. J. Ch. 794, and *Jones v. G. C. R.*, *infra*, and *Bray*, 422, and *qu. Bristol v. Cox*, 26 C. D. p. 681, followed in *Worthington v. Dublin R. Co.*, 22 L. R. Ir. 310, protecting minutes of a corporation merely relating to pending or anticipated litigation. They are also protected so far as they contain privileged matter (see (n.) "Unprivileged Communications," *supra*, p. 30).

Cases on (n.) "Conditions of above Privilege," *supra* :—

Anderson v. Bank of Columbia, 2 C. D. 644, followed in *Kerry C. C. v. Liverpool Association* (1905), 2 I. R. 38, report of agent to principal not for communication to solicitor. *Bustros v. White*, 1 Q. B. D. 423; correspondence between plaintiffs' firm in Liverpool and their firm abroad. *English v. Tottie*, 1 Q. B. D. 141; correspondence between defendant and his agents. *M'Corquodale v. Bell*, 1 C. P. D. 471; correspondence between the plaintiffs' solicitors and a railway company's solicitors. *Pacey v. London Tramways Co.*, and *Friend v. L. C. & D. R. Co.*, 2 Ex. D. 437, and 440 n.; reports of medical officers sent to examine plaintiff injured in accident. *Southwark Co. v. Quick*, 3 Q. B. D. 315; shorthand writers' notes of conversations and interviews between different officers and *employés* of the company and a statement of facts drawn up by the chairman for communication to solicitor, but not communicated. *The Theodor Korner*, 3 P. D. 162, surveyor's reports as to damage to cargo, but *qu. Martin v. Butchard*, 36 L. T. 732, reports as to imperfect construction of ship. *Bullock v. Corrie*, and *Nordon v. Defries*, cited (n.) "The Litigation," *supra*. *Wheeler v. Le Marchant*, 17 C. D. 675; report of surveyor to solicitor not in view of litigation; *Sammon v. Bennett*, 8 Times Rep. 235, following this case. *Calcraft v. Guest*, (1898) 1 Q. B. 759, citing *Wheeler v. Le M.* and *Minet v. Morgan*. *Jones v. G. C. R. Co.*, (1910) A. C. 4, statement made by plaintiff to his trade union as required by rules to enable them to decide whether they would sanction employment of solicitor in action against defendants held not privileged. *Young v. Holloway*, 12 P. D. 167: letters from third persons sent by them spontaneously to the solicitor and to counsel protected, but not those to the client and not for communication to her solicitor. *Lyell v. Kennedy*, 27 C. D. 1, discussed in (n.) "Pre-existing Documents," *supra*; *Kennedy v. Lyell*, 9 App. Ca. 81, discussed in (n.) "Privileged Information," *infra*.

Hutt v. Haileybury College, and *Rochefoucauld v. Boustead*, cited *supra*. *Haslam Co. v. Hall*, 3 Times Rep. 776; documents to be communicated to the solicitor. *Procter v. Smiles*, cited under (n.) "Waiver," *supra*, p. 26; *London and Tilbury Co. v. Kirk*, 28 Sol. Jo. 688; reports from defendants' foreman. *Cook v. Metrop. Tram. Co.*, and *Collins v. L. G. O. Co.*, cited *supra*, (n.) "Anticipated Litigation." *Learoyd v. Halifax Jt. St. Bk. Co.*, and *North Australian Co. v. Goldsborough*, and *Goldstone v. Williams*, cited *supra*, (n.) "*Publici juris*."

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Privileged Information.—The Client.—It was held in *Kennedy v. Lyall*, 23 C. D. 387, 9 A. C. 81, that if the client's information is derived solely from communications which would be privileged from production on the ground of professional privilege the information and his belief founded thereon is privileged. There the information had been obtained by the solicitor in view of litigation and communicated to the client: in *Lyell v. Kennedy*, 27 C. D. 1, a further answer was ordered in order to make it clear that the agents who had procured the information were persons who could be deemed to be agents of the solicitor. Where, therefore, the information has been obtained from a third person by the solicitor otherwise than for or in view of litigation, then as the document is not privileged (see *Wheeler v. Le Marchant*, cited *supra*, p. 30) the information would not be privileged. Further it is conceived (see Article 60, *supra*) that there could be no privilege for information obtained by the client for communication to but not at the request of the solicitor from a third person, although (see *Southwark v. Quick*, under (n.) "Communications . . . Third Person," *supra*) the document might be privileged: certainly not where the third person is the client's agent (see Cotton, L.J., in *Southwark v. Quick*, at p. 321; r. 11, (n.) "Information of agents," *infra*; *Pavitt v. North. M. T. Co.*, 48 L. T. 730; *Gort v. Rowney*, 28 Sol. Jo. 533; and *qu. London Co. v. Kirk*, 51 L. T. 599). The communication must of course be confidential, as pointed out by the C. A. in *L. v. K.*, and see (n.) "Confidential," *supra*: and on this ground the C. A. excepted the case where the question was as to a simple fact patent to the senses, but *Bramwell, L.*, in the House of Lords doubted it; so in *Foakes v. Webb*, 28 C. D. 287, it was held that it was no valid objection to disclosing what took place between the respective solicitors of the parties that his only information was derived from confidential communications from his solicitor that could not be confidential: and see (n.) "Legal Adviser," *infra*.

The Legal Adviser.—Whatever he has learnt confidentially in his professional capacity is privileged, and he must claim the privilege, for it is the privilege of his client (see (n.) "Waiver," *supra*, p. 26). The cases on confidential or unconfidential facts are very numerous, and are cited in *Bray*, pp. 425—443: and see (n.) "The Client," *supra*; the question has generally arisen in the witness-box. See *Bursill v. Tanner*, 16 Q. B. D. 1, solicitor held bound to disclose the names of the trustees (his clients) as not confidential, and also he must say for whom he was claiming the privilege; and *Re London and N. Bank*, (1902) 2 Ch. 73, held not bound to disclose from whom he received certain documents for his client.

(c) DISCLOSING THE PARTY'S EVIDENCE.

A Party is not bound to discover the Evidence of his Case.—The reason is that it would enable an unscrupulous opponent to tamper with the witnesses, and to manufacture evidence in contradiction, and so shape his case as to defeat justice: see *Benbow v. Low*, 16 C. D. p. 95; *Re Strachan*, (1895) 1 Ch. pp. 445, 447—48, and Article 62, *supra*. See this subject in connection with the doctrine of legal professional privilege, (n.) "Materials for Evidence," *supra*.

O. 81, r. 1. By Answers to Interrogatories.

Nature of Case.—He must discover the nature of his case, or the facts on which he relies in support of his case, as distinguished from the evidence of his case or of the facts or from the way in which he is going to make out his case, or the line of facts not being facts directly in issue on which he is going to rely in support of his case or the conduct of his case at the trial (*Eade v. Jacobs*, 3 Ex. D. p. 337; *A.-G. v. Gaskill*, 20 C. D. p. 529; *Marriott v. Chamberlain*, and *Hooton v. Dalby*, cited under (n.) "Names of Witnesses," *infra*; *Lever v. Associated Newspapers*, cited *infra*, p. 44; *Benbow v. Low*, 16 C. D. pp. 96—98; *Bolckow v. Fisher*, 10 Q. B. D. p. 170; *Ridgway v. Smith*, cited *infra*, p. 44; *Milbank v. Milbank*, *infra*; and Article 63, *supra*). The object is that his opponent may know what case he has to meet (*Marriott v. Chamberlain*, 17 Q. B. D. p. 164); but it is also legitimate in order to see if he will pledge his oath to the truth of his case.

Where a transaction, or conversation, or what happened on a particular occasion is disputed or is otherwise material, a party must give the substance (not the details) of it or his version of it: *Eade v. Jacobs*, 3 Ex. D. 335, substance, not details, of conversation relied on as parol authority: *A.-G. v. Gaskill*, 20 C. D. 519, recollection of conversation: *Fisher v. Owen*, 8 C. D. 646, substance of conversation with deceased person, following *Eade v. Jacobs*; *Bolckow v. Fisher*, 10 Q. B. D. 161, the material facts as to position, course, and conduct of ship when lost, not the witnesses' accounts (see further as to this case r. 11, (n.) "Information of Agents").

Paying money into Court.—See r. 11 (n.) on this point.

Matter in the Nature of Particulars.—This may, subject to the special discretion given to the judge by r. 2, *infra*, be obtained in the form of answers to interrogatories, and if any subsequent facts are discovered application may be made to amend the answers in the same way as particulars are amended (*Saunders v. Jones*, 7 C. D. p. 452; *Gay v. Labouchere*, 4 Q. B. D. p. 207; *Augustinus v. Nerincka*, 16 C. D. 13; *Benbow v. Low*, 16 C. D. p. 97). *Cases*:—(*Saunders v. Jones*, 7 C. D. 435), particulars of misconduct alleged to justify dismissal of plaintiff; (*Johns v. James*, 13 C. D. 370, *Lyon v. Tweddell*, 13 C. D. 375), particulars of conduct alleged to justify dissolution of partnership; (*Ashley v. Taylor*, 38 L. T. 44), particulars of alleged fraudulent statements; (*Benbow v. Low*, 16 C. D. 93), action for infringement of trade mark, particulars of goods sold by plaintiff refused, for, pp. 96, 99, it was not required in order to show the nature of the acts and things relied on by plaintiff, but it was a desire to know what evidence would be given by him; (*Moseley v. Victoria Co.*, 55 L. T. 482), patent action; (*Cooper v. Blackmore*, and *Lever v. Associated Newspapers*, cited *infra*, p. 44; *Bidder v. Bridges*, *infra*), instances of exercise of commonable rights (*Hooton v. Dalby*, and *Marriott v. Chamberlain*, cited under (n.) "Names of Witnesses," *infra*).

Title to Land.—**Actions for Recovery of Land.**—In all actions where the title to land is in question a party is upon the same principle bound to disclose the nature of his title where that title is his case: *Cayley v. Sandycroft, &c., Co.*, 33 W. R. 577, action of trespass in working coal, defendants held bound to say under what document or authority they claimed to be entitled to the coal; *Bidder v. Bridges*, 29 C. D. 29, action claiming commonable rights; and see *Kennedy v. Lyell*, 23 C. D. 387, nature of plaintiff's possession: and *Milbank v. Milbank*, (1900) 1 Ch. 376, particulars of transaction under which defendant claimed title. But a defendant in ejectment pleading, under O. 21, r. 21, that he is in possession, is not bound to give any discovery relating to his own title (and not supporting the plaintiffs' case, see *Miller v. Kirwan*, *infra*), for his case is not that he has a title, but that the plaintiff has no title. His

privilege, therefore, to refuse discovery as to his own title (*Lyell v. Kennedy*, and *Miller v. Kirwan*, *infra*; *Eyre v. Rodgers*, cited r. 6, (n.) "Names of Persons"; *Horton v. Donnington*, 2 Times Rep. 739, plea of Statute of Limitations; *Bleazby v. B.*, 10 L. R. Ir. 60, nature of defendant's possession), is no departure from the rule that a party is bound to disclose the nature of his case; and see (n.) "Impeaching," *infra*. But there is the same right in ejectment actions to interrogate and have discovery of documents as in other actions: *Lyell v. Kennedy*, 8 App. Cas. 217. In *Lyell v. Kennedy* the interrogatories were as to his own pedigree and as to the defendant's fiduciary position in order to defeat defence of Statute of Limitations; and where a plaintiff as part of his case makes specific allegations as to the defendant's title, he may interrogate in support of those allegations (*Miller v. Kirwan*, (1903) 2 I. R. 120). The court will protect the defendant against fishing applications, and will insist upon the plaintiff putting forward a clear and definite case: see, for instance, *Philipps v. P.*, 40 L. T. 815, commenting on *New British Co. v. Peed*, 3 C. P. D. 196, followed in *Wrentmore v. Hagley*, 46 L. T. 741, but it was said that leave to interrogate as to a particular document might have been allowed. So in *Jones v. Watts*, 43 C. D. 574, action for specific performance of contract to take a lease under which the defendant was precluded from calling for the freehold title, it was held that he in order to get any discovery of the deeds of the plaintiff's title must allege some specific defect or objection and upon that issue he would have the ordinary right to discovery.

Impeaching or destroying Adversary's Case.—A party is entitled to interrogate for the purpose of impeaching or destroying his adversary's case (see *Grumbrecht v. Parry*, 32 W. R. 558; *Hennessy v. Wright*, 24 Q. B. D. p. 447; *A.-G. v. Newcastle*, (1897) 2 Q. B. p. 394, and *Plymouth, etc., Co. v. Traders' Pub. Assn.*, (1906) 1 K. B. p. 417; *Hooton v. Dalby*, cited *infra*): even where his own case upon this point may be a mere general traverse (see interrogatories in *Bidder v. Bridges*, 29 C. D. 29); and see as to documents, (n.) "By Production of Documents," *infra*. A plaintiff in ejectment is not entitled to discovery for the purpose of destroying or impeaching the defendant's title, for it is not material to him to destroy the defendant's title without making out his own, see (n.). *supra*.

Names of Witnesses.—It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call when their names do not form any substantial part of the material facts in the case; but where the name is a material fact it must be disclosed, and it is no answer that in giving the information the party may disclose the names of his witnesses (*Marriott v. Chamberlain*, 17 Q. B. D. 154, where the plaintiff was ordered to disclose the names and addresses of certain persons whom he alleged were in possession of certain letters the existence of which was in dispute; *Hooton v. Dalby*, (1907) 2 K. B. 18, an action for seduction, where defendant denying that he was the father of the child, plaintiff was held not entitled to ask for the name of any person whom defendant alleged to be the father, as it was a fishing interrogatory to ascertain defendant's witnesses, or as to his evidence, or as to the line of facts not being facts directly in issue on which he was going to rely). See also *Eade v. Jacobs*, 3 Ex. D. 335, not the names of persons present when an alleged consent was given; *A.-G. v. Gaskill*, 20 C. D. 519, explaining it; *Lyon v. Tweedell*, 13 C. D. 375, and *Johns v. James*, 13 C. D. 370; *Re Strachan*, (1895) 1 Ch. pp. 447-8; *Humphries v. Taylor Co.*, 39 C. D. 693, following *Marriott v. Chamberlain*, the names and addresses of the persons alleged to have purchased defendant's goods as and for the plaintiff's goods; *Blackburn v. Lodge* (C. A., *ex rel.*), action for supplying goods improperly dyed, the names of, and the instructions given by defendants to, the persons who had dyed the goods for them;

O. 31, r. 1. *Birch v. Mather*, 22 C. D. 629, patent action, the names and addresses of persons alleged in particulars of objections to have used the patent; *Alliance Pure White Lead Syndicate v. MacIvor's Patents*, 39 W. R. 487, similar case, defendant alleging general user; *McColla v. Jones*, 4 Times Rep. 12, not the names of persons from whom defendant alleged in his particulars he had received certain information as being his witnesses; *Hall v. Liardet*, W. N. (1883) 175, names of judges, who had given a prize to a machine; *Marshall v. Metrop. District Co.*, 7 Times Rep. 49, action for personal injuries, not the names of Co.'s servants who saw the accident; and see as to libel and slander actions (n.) *infra*, p. 43. See as to the witnesses of the interrogating party, *infra*, r. 7 (n.).

By Production of Documents.

Form of Claim for Protection.—Documents which of themselves evidence (see as to documents merely containing evidence to be used, (n.) "Materials for Evidence," p. 31) exclusively the party's own case are clearly (*MacLean v. Jones*, 66 L. T. 653, limiting it to documents of title to land being dissented from by the C. A. in *Budden v. Wilkinson*, (1893) 2 Q. B. 432; and see *Frankenstein v. Gavin*, cited *infra*) protected; and the privilege extends to documents exclusively relating to his case if properly claimed by him.

He must swear that (to the best of his belief, and after proper examination, see Article 23, *supra*) they form or support or evidence or relate exclusively to, his own case (see *A.-G. v. Newcastle*, *infra*), that they contain nothing supporting or tending to support the adversary's case, and (but see *infra*) that they contain nothing impeaching his own case, see for instance *A.-G. v. Emerson*, 10 Q. B. D. 191; *Minet v. Morgan*, L. R. 8 Ch. 361, and *Budden v. Wilkinson*, (1893) 2 Q. B. 432; but it has been decided by Kekewich, J., in a recent case of *Johnson v. Whitaker*, 90 L. T. 535, and by the C. A. in *A.-G. v. Newcastle*, (1899) 2 Q. B. 478, that the last assertion cannot now be insisted on in any case; and see Article 64, *supra*, (n.) discussing this point.

It is not now necessary to describe the documents or their nature, "certain documents" is enough; see *Budden v. Wilkinson*, *supra*, and *Bewicke v. Graham*, 7 Q. B. D. 400, and Article 64, *supra*, (n.), commenting on this practice and referring to observations of Lord Lindley. See as to what description is necessary to constitute a sufficient affidavit, r. 13 (n.), "Sufficient Description," *infra*.

Conclusiveness of Claim.—The above general assertion is accepted as conclusive unless the Court is reasonably satisfied or reasonably certain from particular sources (see (n.) "Conclusiveness of Claim," p. 24) that the nature of the documents, that is their nature as described by the party in his general assertion, has been erroneously represented or misconceived, or the documents are of such a character that the party cannot properly make such an assertion (*A.-G. v. Emerson* and *Frankenstein v. Gavin's Co.*, *infra*, and see *Roberts v. Oppenheim*, 26 C. D. at p. 734).

Cases.—*A.-G. v. Emerson*, 10 Q. B. D. 191, information by Crown claiming a declaration of title to a foreshore, and a commission to ascertain boundaries; defendant claimed it as lord of the manor; production of court rolls ordered, and see *A.-G. v. Newcastle*, cited in (n.) "Upon Application for further Affidavit," *infra*, p. 50. *Frankenstein v. Gavin's Co.*, (1897) 2 Q. B. 62, action for fraudulently misrepresenting the number of subscribers, defendants' claim to protection for the applications to become subscribers held unimpeachable. *Ponsonby v. Hartley*, W. N. (1883) 44; action to restrain working of minerals, the Court inspected one of the documents, and considering that it tended to support plaintiff's title, and that the affidavit, being to this extent inaccurate, could not be relied on as to the other documents, ordered inspection of all (but see *Leslie v. Cave*, 56 L. T. 332; where Kekewich, J., refused to

follow this decision): *Marsh v. Bailey*, cited in *Bray*, pp. 508—9, case of disputed boundary, where inspection of parcels and maps was sought. *Hey v. de la Hey*, W. N. (1886) 101; where privilege was claimed for letters between the two defendants and account books in the full form, including the assertion that they were intended to be used in evidence, and the C. A. ordered their production, for they could not be evidence for the defendants.

**O. 31,
rr. 1, 2.**

(d) INJURIOUS TO PUBLIC INTERESTS.

Public official documents are protected from disclosure if it would be injurious to the public interest (*Wadeer v. E. I. Co.*, 8 De G. M. & G. p. 191; and cases *infra*).

Mode of making Objection.—In *Kain v. Farrer*, 37 L. T. 469, it was held that it was not sufficient for the defendant to object to produce all documents in his official custody on the ground of public policy and to refuse to state anything further, the mind of the proper person must be brought to bear on the question, and he must go through the documents and consider them; and the view expressed was that an affidavit ought to be made by the head or secretary of the department. But in *Hennessy v. Wright*, 21 Q. B. D. 509, it was held, in reference to copies of official despatches and State papers, that it was the duty of the Court to prevent their disclosure (and see *Chatterton v. Sec. of State for India*, (1895) 2 Q. B. p. 195), and that an affidavit by the Secretary of State was not necessary, distinguishing between production by way of discovery and production at the trial; and an affidavit of the plaintiff to the effect that the Secretary of State having had his attention called to the documents had directed him to object to produce them on the ground of the interests of the State and of the public service was held sufficient. *Quære*, whether the Court was right in holding that these copies were the plaintiff's property: he swore that he held them as Governor and subject to the direction of the Sec. of State. *Hennessy v. Wright* was followed in *Wright v. Mills*, 62 L. T. 558 (Colonial Office); and in *Ford v. Blest*, 6 Times Rep. 295 (alleged libellous official report to colonel of regiment); and in *Re Jos. Hargreaves*, (1900) 1 Ch. 347 (income-tax returns). See also *The Bellerophon*, 23 W. R. 248, and *Marks v. Beyfus*, 6 Times Rep. 350.

ACTIONS FOR DISCOVERY.

Under the present practice it can be but rarely necessary to institute actions of this nature. The effect of s. 24, s.-s. 7, of the J. A. is to give jurisdiction to the Court before whom a cause or matter is pending, to order therein all discovery in aid of the claim or defence which could, before the Act, have been obtained by a bill of discovery (*Ramsden v. Brearley*, 33 L. T. 322); for instance, a bill of discovery under 6 & 7 Will. IV. cap. 76, s. 19, relating to libels in newspapers, *ibid*.

The following are the only reported cases of actions for discovery since the J. A.:—*Orr v. Diaper*, 4 C. D. 92, names of consignors of goods and particulars of shipments; *Reiner v. Salisbury*, 2 C. D. 378, in aid of proceedings to recover land in India; *Ainsworth v. Starkie*, W. N. (1876) 8, in aid of arbitration; and *Dreyfus v. Peruvian Co.*, *infra*.

No action for discovery will lie in aid of proceedings in a foreign court (*Dreyfus v. Peruvian Co.*, 41 C. D. 151).

See generally as to bills for discovery, *Bray*, pp. 609—619.

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court or Judge. In deciding upon such applica-

844.

Particular
interrogatories
to be sub-
mitted.

**O. 31,
rr. 2—5.**

tion, the Court or Judge shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matter in question, or any of them, *and leave shall be given as to such only of the interrogatories submitted as the Court or Judge shall consider necessary either for disposing fairly of the cause or matter or for saving costs.*

R. S. C., Nov. 1893, r. 13, substituted for O. 31, r. 2 (1883). The words in italics are new.

"Application for Leave."—See r. 1 (n.) "Time for discovery."

Application may be made for leave to deliver further interrogatories (*Boake v. Stevenson*, (1895) 1 Ch. p. 360).

"The particular interrogatories."—In *Tye v. Willoughby*, 38 Sol. Jo. 338, Chitty, J., said that under this new rule the judge was not to settle the interrogatories but to decide what should be administered. Allowing an interrogatory does not preclude any objection being taken in the answer under r. 6 : *per* C. A. in *Peek v. Ray*, (1894) 3 Ch. 282.

The C. A. will not interfere unless there is some question of principle involved or some substantial injustice, *ibid.*

"Particulars."—See (n.) "Matter in the nature of particulars," p. 34.

"Necessary."—See (nn.) to rr. 6 and 7 ; and "It shall be lawful," to r. 14.

Forms.—Application, Chitty F. p. 266 ; D. C. F. p. 956. Order, Chitty F. p. 267 ; Seton, p. 50. Serve copy proposed interrogatories with summons at the address for service.

345.
Costs of
interrogatories.

3. In adjusting the costs of the cause or matter inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the court or judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

See O. 65, r. 27 (20).

346.
Form of.

4. Interrogatories shall be in the Form No. 6 in Appendix B, with such variations as circumstances may require.

Forms.—Interrogatories, Chitty F. pp. 267—272 ; D. C. F. p. 957.

347.
Corporation
companies.

5. If any party to a cause or matter be a body corporate or a joint-stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

The old practice in Chancery was to make him a party for the purpose of discovery : this can no longer be done (*Wilson v. Church*, 9 C. D. 552).

"Party to a Cause or Matter."—See notes to r. 1, *supra*, pp. 21—23, and (n.) "Liquidator," *infra*.

O. 31, r. 5.

"Body Corporate or other Body."—(See generally Article 3, *supra*.) See as to the Crown, A.-G., and Foreign States, *supra*, p. 21; and as to the Charitable Trusts (Recovery) Act, 1891, Vol. II., Pt. V.

"Member or Officer."—The officer or member is the representative or *alter ego* of the body for the purpose of answering the interrogatories (*Berkeley v. Standard Co.*, 13 C. D. p. 101). It is not his answer but the answer of the body, and therefore there is no obligation either to disclose his knowledge or to obtain and disclose the knowledge of other agents or servants of the body acquired by him or them otherwise than in the course of his or their employment (*Welsbach Co. v. New Sunlight Co.* (1900) 2 Ch. 1, and see r. 11 (n.) "Information of agents."

The body is served with the application (and if it is desired to interrogate a member who is not the secretary or other proper officer, the member also as a rule must be served (*Chaddock v. British S. A. Co.*, (1896) 2 Q. B. 153)); the solicitor of the body should act for the officer or member, and his costs are part of the body's costs (*Berkeley v. Standard Co.*, 13 C. D. pp. 99, 100, 102).

It is open for the applicant to show why one member and not another can give the information, or why one member can give information on one set of questions and another member on another set of questions (see *Wilson v. Church*, 9 C. D. p. 557; *Berkeley v. Standard Co.*, 9 C. D. 643; *Re Alexandra Palace Co.*, 16 C. D. 58; *Tannetta & Co. v. Newport Dock Co.*, 6 Times Rep. 325); or even it would seem from *Comp. Pacifique v. Peruvian Guano Co.*, 28 Sol. Jo. 410, all the interrogatories might be delivered to different officers, each officer to answer those on which he had special knowledge. An order may be made on the body to answer "by the secretary or clerk or other proper officer" (see *Mayor of Swansea v. Quirk*, 5 C. P. D. 106); or "the proper officer" (*Chaddock v. British S. A. Co.*, *supra*).

The secretary is, as a rule, the proper person to answer (Jessel, M.R., in *Berkeley v. Standard Discount Co.*, 13 C. D. p. 99); and it was his practice not to direct a member to answer unless there was no officer who had a competent knowledge of the facts (*ibid.*). But an officer, if selected to answer, must, if he have no personal knowledge of the facts, apply to those servants of the company who may have such personal knowledge (see *Southwark Co. v. Quick*, 3 Q. B. D. 315; and see *supra*, referring to *Welsbach Co. v. New S. Co.*). The person proposed by the applicant will not be called on to answer if the body show any reasonable objection to him (*Manchester Co. v. Slagg*, *infra*; and see *Republic of Costa Rica v. Erlanger*, 1 C. D. p. 173).

Town Clerk.—Where the body elected to answer through their town clerk it was held in *Mayor of Swansea v. Quirk*, 5 C. P. D. 106, that he could not refuse to answer on the ground that his information was derived from privileged communications from the body to himself as their solicitor: but where the opponent had insisted on the town clerk answering the interrogatories it was held in *Corp. of Salford v. Lever*, 24 Q. B. D. 695, that it was a good ground for refusal: *qu.* as to the soundness of the distinction, see Article 18, *supra*. Information falling within the principle discussed in (n.) "Privileged information," p. 33, would of course be protected whoever answered for the body.

Liquidator.—Where there is a question between him as representing the company on the one hand and the contributory or other person on the other hand, he is in the same position and under the same obligation to give discovery as if he were the opposite party in an action, as if he were the officer called upon to give discovery on behalf of a litigant company (*Re Contract Corp.*, L. R. 7 Ch. 207; *Re Barneds Banking Co.*, L. R. 2 Ch. 350). But he will not as of course be ordered

**O. 31.
rr. 5—7.**

to make an affidavit of documents—he is an officer of the court; if he will not do what is right the court will compel him. The proper course for a hostile litigant who seeks inspection is to apply to the liquidator for inspection, and if satisfactory inspection is not obtained an order will then be made (*Re Mutual Society*, 22 C. D. pp. 720, 721). The liquidator has a reciprocal right of discovery against him (*Re Alexandra Palace Co.*, 16 C. D. 58). A liquidator carrying on an action in another person's name cannot be interrogated: *Massey v. Allen*, W. N. (78) 246. See also *London and Yorkshire Bank v. Cooper*, cited *infra*, r. 14 (n.) "Possession or Power."

Reading Answer against Body.—The opinion seems to have been formerly that it could not (see cases cited *Bray*, pp. 83, 84); but it is settled now that it can (*Welsbach Co. v. New Sunlight Co.*, (1900) 2 Ch. 1, and see *Manchester Co. v. Slagg*, W. N. (82) 127, and *Smith, L.J.*, in *Chaddock v. British S. A. Co.*, (1896) 2 Q. B. p. 158).

Forms.—Application, D. C. F. p. 957; Chitty F., p. 266.

Discovery and Production of Documents.—This is obtained by an order against the body for an affidavit of documents in its possession to be made by the secretary, clerk, or other proper officer (see forms in Chitty F., pp. 247, 249, and Seton, p. 54). It should, if possible, be made by some person who has personal knowledge as to the documents in the possession of the body (see Article 24, *supra*). See also (n.) "Body corporate," *supra*, and as to a liquidator (n.) *supra*.

348.

Objections to
interrogatories
by answer.

6. Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

See notes under next rule.

349.

Setting aside
and striking
out interroga-
tories.

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

"Any . . . set aside . . . or struck out.—The new rule 2 practically makes this provision unnecessary.

"May be taken."—Any ground of objection may be taken in the answer (see *Fisher v. Owen*, 8 C. D. p. 654); though the interrogatory has been allowed under r. 2, see *Peck v. Ray*, there cited. If fresh facts are relied on as reasons for not answering, they should be set out; but if the objection is a mere matter of argument, and not a statement of new facts, and the judge sees that the answer is sufficient, he is right in refusing to require the objection to be stated in the answer (*Smith v. Berg*, 36 L. T. p. 472); where it is irrelevant, no reason need be given (*ibid.*; *Church v. Perry*, 36 L. T. 513).

As to the conclusiveness of the party's oath in the answer for the purpose of his claim to protection against answering, see r. 11. (n.) "Answers insufficiently."

"Scandalous."—Nothing can be scandalous which is relevant (*Fisher v. Owen*, 8 C. D. p. 653). Interrogatories, though tending to criminate or discredit the party interrogated, are not scandalous if they are pertinent and material to the case of the interrogating party (*ibid.* p. 651; and see *Allhusen v. Labouchere*, 3 Q. B. D. pp. 660, 661, 666; and *National*

Association v. Smithies, (1906) A. C. 434). In *Kemble v. Hope*, 10 Times Rep. 371, scandalous interrogatories were disallowed. **O. 31, r. 7.**

"Irrelevant."—The discovery must, it was thought, be relevant to the matter in question between the party seeking the discovery and the party of whom it is sought (Bray, p. 59, and Article 9, *supra*, and so apparently considered in *Codd v. Delap*, W. N. (06) 57, 78): but *Spokes v. Grosvenor Co.*, cited under r. 1 (n.) "Opposite parties," *supra*, is hardly reconcilable with any such rule.

For the purpose of testing the relevancy to a particular issue, the case of the party seeking the discovery upon that issue may have to be assumed to be true (see Bray, p. 18).

Under the old Chancery practice the discovery was material if it might be (and so now; see *Shevard v. Lonsdale*, 42 L. T. 172) useful in obtaining any relief which the plaintiff might obtain; and where it was a matter of indifference to the party of whom it was sought the court did not weigh in golden scales the question of materiality or immateriality (*Moore v. Craven*, L. R. 7 Ch. p. 96, n.; and see (n.) "Oppressive," *infra*).

The right to interrogate is not confined to the facts directly in issue, but (subject, of course, to the rule protecting the party's evidence, see *Hooton v. Dalby*, cited under (n.) "Nature of case," *supra*, p. 34), extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue (Esher, M.R., in *Marriott v. Chamberlain*, 17 Q. B. D. p. 163). But the latter part of r. 1, distinguishing between discovery and cross-examination, shows that the discovery must be directly relevant to the matters in issue: *Re Howel Morgan*, 39 C. D. 316; and see *Kennedy v. Dodson*, (1895) 1 Ch. 334. The functions of discovery and cross-examination are different: *A.-G. v. Gaskill*, 20 C. D. p. 530.

Admissions.—(See r. 2, *supra*.) Discovery is not limited to giving the party a knowledge of that which he does not already know, but includes the getting an admission of anything which he has to prove on an issue between himself and his opponent (*A.-G. v. Gaskill*, 20 C. D. p. 528; *Smith, L.J.*, in *Kennedy v. Dodson*, p. 341); to facilitate proof or save expense (*Grumbrecht v. Parry*, 32 W. R. p. 204; *Hall v. L. & N. W. Ry. Co.*, 35 L. T. p. 850); *A.-G. v. Gaskill*, pp. 527, 528; *Saunderson v. Baron von Radeck*, 119 L. T. Jo. 33.

Evidence and Names of Witnesses.—It is admissible to interrogate to facts which will inform the party as to evidence to be obtained (*A.-G. v. Gaskill*, 20 C. D. p. 528); the names of persons who may give evidence for him (*Hall v. Liardet*, W. N. (83) 175); and see *Dalgleish v. Lowther*, cited *infra*, p. 44, persons present at alleged slander. See, as to the opponent's witnesses (n.), "Names of witnesses," *supra*, p. 35.

Names of Persons to make them Parties.—This is legitimate—for instance, of incumbancers in foreclosure or redemption actions (*Union Bank of London v. Manby*, 13 C. D. 239); defendant's husband (*Hancocks v. Lablache*, 3 C. P. D. p. 202); defendant's tenants in ejectment actions (*Eyre v. Rodgers*, 40 W. R. 137); and see Bray, p. 19.

Redemption Actions.—Discovery of prior incumbancers' securities must be given (*West of England Bank v. Nickolls*, 6 C. D. 613). So names of incumbancers, see note, *supra*.

Damages.—Discovery relating to the quantum of damages is clearly relevant, although (see (n.) "Not sufficiently material at that stage," *infra*) it may be postponed until the question of liability has been decided: see, for instance, *Marriott v. Chamberlain*, 17 Q. B. D. 162, interrogatories by defendant as to matter which would tend to reduce damages: *Pape v. Lister*, L. R. 6 Q. B. 242, inspection by defendant of letters in breach of promise action bearing only on the question of damages, he admitting the promise: Bray, p. 113, interrogatories as to defendant's means: *Seafie v. Kemp*, *infra*, p. 44; *Elkin v. Clarke*, and

O. 31, r. 7. *Schreiber v. Heymann, infra*; *Ladds v. Walthew*, 32 W. R. 1000, inquiry as to damages; *Fennessy v. Clark, infra*.

Paying Money into Court.—For the purpose of paying a proper sum into court, a defendant admitting liability has been held to have a special right to interrogate the plaintiff, see *Frost v. Brooke*, 23 W. R. 260; and *Clarke v. Bennett*, 32 W. R. 550, in which case however the court failed to recognise the general right to discovery relating to the amount of damages, see (n.) *supra*. In *Megaw v. McDiarmid*, L. R. Ir. 10 C. L. 376, discovery of documents was allowed for this purpose.

Other Instances and Cases of Relevancy.—See cases under (nn.) "Oppressive," *infra*. "Disclosing the party's evidence," p. 33, and "Relating to any matter in question," r. 14 (n.).

"Not sufficiently material at that stage."—The comments of the judges upon r. 20 of this order are material in this connection. "Now, in deciding whether discovery ought to be given, we must first consider whether it will help the plaintiff at the trial. If it will not, but will only be of use if the plaintiff obtains a decree, then, having regard to the discretion given to the court by O. 31, r. 19 (now r. 20), we must consider whether it is fair that the defendant should be obliged to give it at this stage of the proceedings, or whether to compel him to give it would be oppressive," Jessel, M.R., in *Parker v. Wells*, 18 C. D. p. 483; and see *ibid.* pp. 484—487. "The court is always unwilling before the right to relief is established to make an order for discovery which may be injurious to the defendant, and will only be useful to the plaintiff if he succeeds in establishing his title to relief," Cotton, L.J., in *Fennessy v. Clark*, 37 C. D. p. 187; and see *Rowcliffe v. Leigh*, 6 C. D. p. 263; *Leitch v. Abbott*, 31 C. D. 374, and the cases, *infra*.

Accounts may be sometimes properly required. An executor was, in equity, under a peculiar obligation to set out in his answer the accounts of the testator's estate, and this obligation has been recognised under the J. A. (*Re Sutcliffe*, 44 L. T. 547; and see also *St. George v. St. G.*, 19 L. R. Ir. 225, where executors who had pleaded "*plene administravit*" were ordered to answer as to personal estate come to their hands, in order to test the truth of the plea). In other cases, where the giving of the accounts would occasion little trouble, and would enable the plaintiff to get an immediate judgment at the trial, though his title is denied, abridged accounts may be ordered; but not where the giving of them would be of no assistance at the trial, or where the title to an account is denied, and they are complicated, or it would be prejudicial to the opponent, or oppressive (see *Benbow v. Low*, 16 C. D. p. 98, and other cases, *infra*).

Cases.—*Rowcliffe v. Leigh*, 6 C. D. 256; entries of prices in books not material to the issue as to agency. *Parker v. Wells*, 18 C. D. 477; profits of alleged trust fund not material to issue as to trust and distinguished in *Re Howel Morgan*, 39 C. D. 316, where defendant was ordered to state the amount of income received, as it would enable the plaintiff, if she succeeded, to get an immediate judgment for payment. *Hemery v. Worssam*, 26 Sol. Jo. 296; action to set aside sale of business, defendant held not bound to set out profits of business since the sale. *Verminck v. Edwards*, 29 W. R. 189; invoices not material to issue as to agency. *Whyte v. Ahrens*, 26 Ch. D. 717. *Fennessy v. Clark*, 37 C. D. 184; amount of damages premature, an order having been made for trial of questions of fact by a jury. *Witham v. W.*, 28 Sol. Jo. 456; action for admitted breach of trust for employing trust money in business, held not premature to ask as to profits of business. *Elkin v. Clarke*, 21 W. R. 447, and *Schreiber v. Heymann*, 63 L. J. Q. B. 749, actions for commission on sales; inspection of documents relevant only to amount refused as premature. *Saunders v. Jones*, 7 C. D. p. 449,

amount of profits on which commission was claimed; *Benbow v. Low*, 16 C. D. p. 98, account refused.

O. 81, r. 7.

"Oppressive."—Interrogatories must not be of such a nature as to be oppressive and to exceed the legitimate requirements of the particular occasion, *White v. Credit Reform*, (1905) 1 K. B. p. 659.

It is not because answering an interrogatory would involve trouble or expense or the disclosure of private or business or confidential matters of the party, or a stranger, that the interrogatory is *oppressive*, if the discovery is material at that stage, and the object of the party seeking the discovery cannot, so far as it is legitimate, be obtained in any more convenient way, although even before the new Rule 2 it would be considered oppressive to order discovery of that nature if not clearly material (see Article 41, *supra*, Bray, pp. 298—307, and cases, *infra*).

Cases.—*Saccharin Corp. v. Anglo Works*, (1901) 1 Ch. 414, inquiry as to profits in patent action, inspection ordered of names and addresses of customers. *Mistovski v. Maudleberg*, 6 Times Rep. 207, interrogatories as to materials used in manufacturing processes being trade secrets. *Ashworth v. Roberts*, 63 L. T. 160, patent action, interrogatories as to secret process and customers. *A.-G. v. North Met. Tram. Co.*, (1892) 3 Ch. 70, discovery of books of rivals in trade refused, but leave to interrogate given: these having been answered, inspection was refused by the C. A. (72 L. T. 349). *Blackburn v. Lodge*, cited *supra*, p. 35, instructions by manufacturers to sub-manufacturers, and names of latter. *Petre v. Sutherland*, 3 Times Rep. 275, inspection of stockbroker's books. *Smith v. Berg*, 36 L. T. 471; defendants sued as man and wife, interrogatories as to separate estate allowed (and see *Lee v. Buchanan*, 26 Ir. L. T. R. 50, woman married after writ), not those asking if they were married. *Sheward v. Lonsdale*, 5 C. P. D. 47; (C. A.), 42 L. T. 173; claim for horses sold to defendant. *Mansfield v. Childerhouse*, 4 C. D. 82; *Young v. Holloway*, 12 P. D. 167; interrogatories by plaintiff in suit to revoke probate as to alleged gifts by testator to defendant in support of case of undue influence allowed. *Rogers v. Lambert*, 24 Q. B. D. 573, action by bailors against bailees, interrogatories by defendant to show *jus tertii* held irrelevant. *Kennedy v. Dodson*, (1895) 1 Ch. 334, interrogatories by plaintiff claiming partnership in a particular matter as to partnership in other matters held irrelevant and oppressive.

Libel and Slander Actions.—The question of oppressiveness has often to be considered in these actions, but the principles on which discovery should be granted or refused are the same as in other actions, nor is there any absolute rule as to granting or refusing any particular discovery, that is to say the circumstances of the particular case must always be considered. In actions against newspapers or trade periodicals where responsibility for the publication of the alleged libel is admitted, the practice is, in the absence of any special reason to the contrary, to refuse to compel the defendant to disclose the name of the writer of the libel or of his informant (*Plymouth, &c., Society v. Traders' Association*, (1906) 1 K. B. 403; *Hope v. Brash*, (1897) 2 Q. B. 188; *Hennessy v. Wright*, 24 Q. B. D. 441; *Parnell v. Walter*, *ibid.* 441; *Gibson v. Evans*, 23 Q. B. D. 384; *Mackenzie v. Steinhopf*, 6 Times Rep. 141); or produce the manuscript (*Hope v. Brash* and *British Co. v. Wright*, 32 W. R. 413), or answer as to its possession or contents (*Hennessy v. Wright*); and in *Blanc v. Burrows*, 12 Times Rep. 521, defendant was held entitled to cover up the name and address of the writer of a letter with the publication of which he was charged. Where it is material to show express malice, or the condition of the defendant's mind, and so defeat a plea of privilege or fair comment, and the discovery is *bona fide* sought for the purpose of the action (not if otherwise, see *Edmondson v. Birch*, (1905) 2 K. B. 523), it is legitimate to interrogate as to the steps or precautions taken, the inquiries made, and the information obtained by the

O. 31, r. 7

defendant before the publication, and also (but not in actions against newspapers, see *supra*) the names of his informants: *Plymouth, &c., Society v. Traders' Publishing Association, supra*; *White v. Credit Reform*, (1905) 1 K. B. 653; *Elliott v. Garrett*, (1902) 1 K. B. 870 (distinguished in a later case in the C. A. *Caryll v. "Daily Mail,"* 90 L. T. 307); *Saunderson v. Baron von Radeck*, 119 L. T. Jo. 33, a recent case in the H. of L. affirming the C. A.; and in *Martin v. British Museum*, 10 Times Rep. 215, the plaintiff was allowed to interrogate for the purpose of destroying the plea of privilege (statutory duty) by shewing negligence or malice. In *Ridgway v. Smith & Son*, 6 Times Rep. 275, action for selling newspapers containing libels, interrogatories asking what precautions they took were disallowed as asking them how they were going to make out their case. A plaintiff in a slander action may interrogate the defendant as to whether he uttered the slander, or words to that effect, and whether in the presence of certain named persons (*Dalgleish v. Lowther*, (1899) 2 Q. B. 590; *Saunderson v. Baron von Radeck, supra*); and in some cases of what other persons (*Dalgleish v. L.*): in *Saunderson v. B. von R.* it was not pressed: in *White v. Credit Reform, supra*, discovery of the names of all the persons to whom the libel had been published was held oppressive: see also (n.) "Evidence and names of witnesses," *supra*, p. 41). The defendant cannot be asked whether he did not mean what is suggested by the innuendo (*Heaton v. Goldney*, (1910) 1 K.B. 754 C.A.). The objection that the discovery is of a criminatory or penal nature must, just as in any other case, be made by the party on oath: see *Allhusen v. Labouchere* and other libel cases cited under (n.) "Criminatory," p. 25. Interrogatories as to circulation of a defendant's newspaper are only allowable in the case of a paper about whose circulation nothing is known (*Whittaker v. Scarborough Post*, (1896) 2 Q. B. 148, disapproving *Parnell v. Walter, supra*, and therefore *James v. Carr*, 7 Times Rep. 4 and *Rumney v. Walter*, 65 L. T. 757). A defendant may interrogate to prove facts which he alleges to be true in support of defence of fair comment; *Peter Walker v. Hodgson*, (1909) 1 K. B. 239, referring to *Hindlip v. Mudford*, 6 Times Rep. 367. A defendant will not be allowed discovery for the purpose of giving particulars of justification (*Zierenberg v. Labouchere*, (1893) 2 Q. B. 183, explained in *Waynes, &c., Co. v. Radford & Co.*, (1896) 1 Ch. 29; and where he has given particulars the discovery will be limited to what is relevant to those particulars (*Yorkshire Provident, &c., Co. v. Gilbert*, (1895) 2 Q. B. 148, followed in *Arnold v. Bottomley*, (1908) 2 K. B. 151, C. A., and see *Kent Coal Co. v. Duguid* (1910) 1 K. B. 904 C.A., affirmed in the H. L., (1910) A. C. 452. In *Lever v. Associated Newspapers*, (1907) 2 K. B. 626, the defence being justification and fair comment, defendant was held not entitled to ask if plaintiff set up express malice, and if so, on what facts he intended to rely, for it was asking him how he intended to conduct his case at the trial, and *Cooper v. Blackmore*, 2 Times Rep. 746, was an exceptional case. See *Scarfe v. Kemp*, (1892) 2 Q. B. 319, interrogatories by defendant to prove matters intended to be given in evidence in mitigation of damages under O. 36, r. 37, allowed: *Barnato v. Keene*, 21 Times Rep. 212, defence of absolute privilege; *Tungyes v. Inman Co.*, 88 L. T. Jo. 32, plaintiff not ordered to say from whom he got copies of libel: *Dalrymple v. Leslie*, (n.) "Their contents," *infra*; *Malone v. Fitzgerald*, (n.) "Explaining answer" to r. 11; *Jones v. Richards*, (n.), "Relating to any matter in question" to r. 14; *Marriott v. Chamberlain, supra*, p. 35; *Louden v. Blakey, supra*, p. 29.

"On any other Ground."—The grounds upon which objection may be taken, other than those specified in r. 6, are those stated in r. 7; the grounds stated in (n.), "Grounds upon which discovery can be resisted," *supra*, p. 24; and the ground stated in the note, *infra*.

Interrogatories as to Documents—(a) Their existence.—The proper mode of ascertaining what documents the adversary has is by an affidavit

of documents, and not by interrogating him. An interrogatory asking as to specific documents is not necessarily open to objection : but see now the new rule 19A (3). In *New Zealand Co. v. Tyser*, 8 Times Rep. 276, interrogatories as to documents in hands of other persons were disallowed ; but there is no objection to them on principle.

O. 31,
rr. 7—10.

(b) **Their Contents.**—In *Dalrymple v. Leslie*, 8 Q. B. D 5 (contents of alleged libellous letter), Bowen, J., considered that it was legitimate to obtain admissions by interrogatories as to written documents for the purpose of simplifying proof ; but that a party could not be compelled to set out his imperfect recollection of a document not produced for his inspection which was not suggested to be lost or beyond the jurisdiction ; that at common law when a party was interrogated as to the contents of an existing written document he was entitled to see it before he answered, that this rule was not altered by the J. A., and that it did not appear that in equity a party could get secondary evidence by interrogatories without accounting *prima facie* for the non-production of the original : but *qu.*, see Bray, pp. 130—4.

See as to interrogating after affidavit of documents, (n.) “ Application to interrogate,” *infra*, p. 51.

Forms.—Application to set aside or strike out, D. C. F. p. 957. Order, Seton, p. 51. Forms of objections to answer, Chitty, F., pp. 274—7.

8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a judge may allow.

350.

Affidavit in answer, filing.

Answering sufficiently, substantially, not evasively nor embarrassingly, and as to his knowledge, information, and belief.—See (nn.) to r. 11.

Objections and mode of stating them.—See (nn.) to rr. 6 and 7.

“ **Within 10 days.**”—In ordinary cases where payment into Court is not ordered the time runs from service of the interrogatories ; where payment is ordered it runs from service of the interrogatories and receipt for payment. As to time generally, see O. 64 ; and forms of application for further time, D. C. F. p. 959 ; and of Order, Seton, p. 51.

Office Copy.—The duty of producing this lies on party on whose behalf it is filed (*Marshall v. N. P. B. of E.*, 61 L. J. Ch. 465 : *Levi v. Taylor*, W. N. (03) 183).

9. An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding 10 folios, be printed, and shall be in the Form No. 7 in Appendix B, with such variations as circumstances may require.

351.

Printing affidavit in answer.

Printing (O. 66, r. 7).—Court will dispense with in a proper case, as where a schedule was over 200 pages and would have cost 18*l.* to print, it was allowed to be filed written (*Webb v. Bornford*, 46 L. J. Ch. 288). As to paper, &c., see O. 66, r. 3.

Forms.—App. B. No. 7, Ann. Pr. ; Chitty F. p. 273 ; D. C. F. p. 959. Application for leave to file supplemental affidavit, D. C. F. p. 960.

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the court or a judge on motion or summons.

352.

No exception to be taken.

“ **Motion or Summons.**”—The application, which should be by notice, D. C. P. 1554 : D. C. F., p. 961 ; Chitty F. 277 (13), should specify the interrogatories or parts of them to which he requires a further answer in order that his adversary may know what is complained of (*Anstey v.*

O. 31,
rr. 10, 11.

North Woolwich Co., 11 C. D. 439; *Ashley v. Taylor*, 38 L. T. 44; *Chesterfield Co. v. Black*, 24 W. R. 783; but where the whole answer is an evasion he may apply to have the whole struck out and a fresh answer put in (*Furber v. King*, cited under (n.) "Not evasively" *infra*).
Forms.—See next rule.

353.

Order to,^a
answer or
answer further.

11. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *vivâ-voce* examination, as the judge may direct.

"Answers insufficiently."—The question is whether the answer is insufficient; the court has not to go into the question of its truthfulness. If the court is clearly satisfied from certain sources (see *infra*) that the oath of the party by which he claims his protection cannot be really available for the purpose for which he puts it forward, a further answer may be ordered; but the court is not justified in disregarding his oath upon mere suspicion, although that may be sufficient to justify the ordering of a further affidavit of documents (*Lyell v. Kennedy*, 27 C. D. pp. 19, 21, 29, and see as to the sources and generally (n.) "Conclusiveness of claim," p. 24). If the party can satisfy the judge that there is reason for thinking that his adversary has answered hastily or loosely, or untruthfully, he can interrogate him specifically over and over again by getting leave to put further interrogatories (Bowen, L.J., *ibid.*, p. 30).

Answering substantially.—A substantial answer is sufficient under the present practice (*Lyell v. Kennedy*, 27 C. D. pp. 15, 16; *Parker v. Wells*, 18 C. D. p. 487; *Bolckow v. Fisher*, 10 Q. B. D. p. 170).

A party may, in answering an interrogatory, refer to his answers to the other interrogatories (see *Lyell v. Kennedy*, 27 C. D., p. 15), but the cross-references must not complicate the answer so as to make it difficult to say what is or is not sworn to (*Walker v. Daniell*, 22 W. R. 595).

Not evasively.—As to the necessity of not answering evasively, see O. 19, rr. 17 and 19, which, though dealing only with pleading, may be taken as equally applicable to answers to interrogatories: they were in fact adopted from the old Chancery rules and practice.

An evasive answer may be ordered to be taken off the file altogether in an extreme case (*Furber v. King*, 29 W. R. 536; and see *Hill v. Hart-Davis*, 26 C. D. 470); but the usual practice is to order a further answer (*Lyell v. Kennedy*, 27 C. D. p. 28).

Matter of supererogation.—When an answer is couched in a form which makes it embarrassing, that is to say which prevents the person who asks for it from using it without having thrust upon him irrelevant matter as part of it, it is insufficient (*Lyell v. Kennedy*, 27 C. D. p. 28, citing *Peyton v. Harting*, L. R. 9 C. P. 9; and see *L. v. K.* on another application, 33 W. R. 44, and *Richards v. Crawshaw*, 8 Times Rep. 446). In *Malone v. Fitzgerald*, 18 L. R. Ir. 187, the defendant in a libel action was held justified in adding to his answer that he published the libel *honestly and without malice*. It is of course legitimate to explain or qualify an answer.

Knowledge, information and belief, answering as to.—A party must answer to the best of his knowledge, information and belief: see *supra*, Arts. 16—19.

Information.—He is bound to state all the information of which he is personally possessed at the time he is interrogated from whatever sources or persons it has been derived; but he is not bound to obtain the information of any one except his agents, see *infra*.

Privileged Information.—See note, *supra*, p. 444.

O. 31,
rr. 11, 12.

Information of Agents.—He is also bound to obtain the information of his agents or servants where he is interrogated as to matters presumably or admittedly done or omitted to be done by them, or in their presence, in the course of their employment, and does not sufficiently answer by saying that he does not know and has no information on the subject (*Bolckow v. Fisher*, 10 Q. B. D. 161, 169, 171; *Rasbotham v. Shropshire, &c., Co.*, 24 C. D. 110); his agent's knowledge is in law his own knowledge on such matters (*Anderson v. Bank of Columbia*, 2 C. D. 644, 657, 659). He is not bound to obtain and disclose the knowledge acquired by his agents or servants otherwise than in the course of their employment (*Welsbach Co. v. New Sunlight Co.*, (1900) 2 Ch. p. 10). "Agents" includes bankers or solicitors (*Alliott v. Smith*, (1895) 2 Ch. 111). He must use his best efforts *bonâ fide* to get the information (*Anderson v. Bank of Columbia*, p. 657). Where the agent is no longer his agent or under his control or is in such a position that it would not be reasonable to force the party to communicate with him, or if he is dead, the party will be relieved from the obligation (*Bolckow v. Fisher*, pp. 169, 171). So an executor was held not bound to inquire of the solicitors or bankers of the testator as to matters occurring twenty years before his death (*Alliott v. Smith, supra*). The information may have to be given, although the document containing it is privileged (see (n.) "Privileged information," *supra*, p. 33). See as to answers of corporate bodies, *l. 5, supra*. Cases: *Bolckow v. Fisher*, officers and crew of ship; *Rasbotham v. Shropshire, &c., Co.*, where *Bolckow v. Fisher* was distinguished; *Hall v. L. & N. W. R. Co.*, 35 L. T. 848, carriers acting as defendants' collecting agents; and *A.-G. v. Rees*, 12 Beav. 50, workmen and agents at colliery.

Examination of Documents.—He must also examine documents in his possession or power if necessary. A document is in his power if he has an enforceable right to inspect it, and he is bound to exercise that right, and even take proceedings to enforce that right if wrongfully refused to him: see *Bray*, 135—138, citing *Taylor v. Rundell, Stuart v. Butte*, 11 Sim. 391, 442, and *Swanston v. Lishman*, 45 L. T. 360, and distinguishing between the obligation to produce and that to disclose the contents of a document. He is not bound to go and search documents which are equally accessible to the party seeking discovery; see, for instance, *Lyell v. Kennedy*, 27 C. D. p. 16, public books such as rate-books. See also *r. 12 (n.)* "Possession or power."

"By vivâ-voce Examination."—A roving cross-examination is not legitimate; the party should only be required to make such an answer as would have been sufficient if originally given in writing: *Litchfield v. Jones*, 51 L. T. 572, where the extra costs were disallowed. As a rule the costs should be reserved, otherwise the examination may be unduly protracted (*Vicary v. G. N. R. Co.*, 9 Q. B. D. 168).

Forms.—Application, Chitty F. p. 277; D. C. F., pp. 960, 961. Order, Seton, pp. 50, 61; Chitty F., p. 277.

12. Any party may, without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents,

354.

Application for
discovery of
documents.

O. 31, r. 12. as may, in their or his discretion, be thought fit. *Provided that discovery shall not be ordered when and so far as the Court or Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.*

The proviso was added by R. S. C., Nov. 1893, r. 13. See (n.) "Refuse, adjourn," *infra*, p. 50.

Cross References.—Form of affidavit, r. 13. Order for production, r. 14. Inspection of documents rr. 15–18. Failure to comply with order, r. 21. Security for costs, rr. 25—27A.

"Any party . . . any other party."—See (n.) "Opposite parties," p. 22.

Co-plaintiffs.—When an order is made on plaintiffs the common order is that the plaintiffs shall make an affidavit of documents in their or his possession or power: and all must join in the affidavit (*Wilson v. Raffalovitch*, *infra*). See as to enforcing order by co-plaintiff *Seal v. Kingston* (n.) to r. 21. In *Herskind v. Hall*, (1908) 2 I. R. 99, it was held that an order against a firm need not specify the name of the individual to make discovery.

Agent.—Liberty given to an agent abroad to make affidavit, *Donovan v. Todd*, (1908) 2 I. R. 100.

Husband and Wife.—Where husband and wife are co-plaintiffs a defendant is entitled to an order in the same form as against any other co-plaintiffs, for the wife may have documents which would not be in their joint possession: *Fendall v. O'Connell*, 29 C. D. 899; and see *Hartley v. Owen*, 34 L. T. 752; and a husband and wife may be separately interrogated, *Smith v. Berg*, 36 L. T. 471; and see *Lee v. Buchanan*, 26 Ir. L. T. R. 50.

Persons suing in other Persons' Names.—These latter are in point of law the plaintiffs and must obey any orders for discovery or production of documents which have been made against them: *Wilson v. Raffalovitch*, 7 Q. B. D. pp. 557, 558, where, one of the plaintiffs not having complied with the order, an order for a further affidavit was made, though if he were not in a condition to make the affidavit the Court would not attach him or dismiss the action, p. 561: *qu.* whether defendants are entitled *ex debito justitiae* to an order for discovery on the nominal plaintiffs in such a case: *ibid.* pp. 557, 560. Where a foreign principal resident abroad was the real plaintiff and was suing by his agent in this country, who was dealt with as agent and not as principal, the Court would not allow the nominal plaintiff to proceed until the real plaintiff had done everything he would have had to do if his name were on the record, and the action was stayed until the principal had made an affidavit of documents upon the principle of *Rep. of Costa Rica v. Erlanger*, 1 C. D. 171 (*Willis v. Baddeley*, (1892) 2 Q. B. 324). But if a plaintiff is not a mere nominal plaintiff without any interest, and has an independent right of his own, no such order can be made so as to compel production of a document in the possession of a person (underwriter), who is interested in a portion of the money claimed (*James Nelson v. Nelson*, (1906) 2 K. B. 217). The practice in marine insurance actions (see (n.) *infra*) is peculiar to those actions. See as to a liquidator, r. 5 (n.) "Liquidator."

Corporate Bodies.—A.-G. and Crown.—See r. 5 (nn.) "Body corporate" and "Discovery of documents."

Next Friend.—Guardian ad litem.—Committee of Lunatic.—See (nn.) to r. 29, *infra*.

Party for purpose of Discovery.—A person cannot be made a party solely for the purpose of discovery; he is a mere witness: *Berry v. Keen*, 26 Sol. Jo. 312; *Burchard v. MacFarlane*, (1891) 2 Q. B. p. 247;

Symonds v. City Bank, 79 L. T. Jo. 175, trustee in bankruptcy; and see *Burstall v. Beyfus*, 26 C. D., pp. 40—42, disapproving the old practice, of making an attorney, agent or arbitrator (*Mathias v. Yetts*, 46 L. T., p. 502, and *A.-G. v. Bermondsey*, 23 C. D., p. 67) a party for costs or discovery, and the cases cited under O. 37, r. 7; and generally as to this subject, Bray, pp. 40—57. As to whether discovery is limited to what is relevant to matters in question between the party seeking discovery and the party from whom it is sought, see (n.) "Irrelevant" to r. 6, *supra*. Where a defendant who has properly been made a party has complied with the plaintiff's demands, it was said that it might be a ground for not staying proceedings against him that the plaintiff may be able to interrogate him (*Heatley v. Newton*, 19 C. D. 326); but *qu*.

O. 31, r. 12.

"Order."—See forms *infra*. The order in the C. D. directs production for the purpose of inspection and at the trial; an attempt to introduce this form into the K. B. D. failed in *Nobel v. Stewart*, 35 Sol. Jo. 546.

"Without Filing an Affidavit."—See (n.) "Refuse," &c., *infra*.

"Cause or Matter."—See (n.) on these words to r. 1.

"Possession or Power."—These words do not here bear the limited meaning which they bear for the purpose of an order for production: see (n.) "Possession or Power," to r. 14, *infra*; all documents must be included in which the party has any possession or property jointly with others, or even in which he has no property at all, if they are in his corporeal possession (but not if they are not in his corporeal possession, for instance the solicitor's own documents in his own possession, see Lindley, L.J., in *O'Shea v. Wood*, (1891) P. 288): see para. 7 of the form prescribed by r. 13; and see *Norton v. Lamport*, 2 Times Rep. 630, where it was said that "agents" in that paragraph meant persons whose custody would be substantially that of the party: and careful search must be made for all relevant documents in his own physical possession, and proper inquiries and efforts made as to those which are not, for instance, documents abroad: see for example *Swanston v. Lishman*, 45 L. T., 360; *Price v. P.*, 48 L. J., Ch. 215; *Jones v. Andrews* 58 L. T. 601, and other cases cited Bray, pp. 220—226; and see Article 23, *supra*. See also r. 11 (n), "Examination of documents," *supra*.

Discovery from interested persons.—See (n.) "Persons suing in other persons' names," *supra*, and (n.) "Marine Insurance Actions," *infra*.

Marine Insurance Actions.—Long before the Jud. Acts the peculiarity of insurance business had given rise to a practice of granting discovery to a larger extent than in ordinary business, see *China Co. v. Commercial Co.*, 8 Q. B. D., p. 145, *Harding v. Bussell*, (1905) 2 K. B., p. 85, where the reasons are given, and *Tannenbaum v. Heath*, (1908) 1 K. B. 1032, C. A.: and *China Traders v. Royal Exchange*, (1898) 2 Q. B. 187, where it was held that a reinsurer is entitled to the ordinary order for ship's papers against the underwriter. The practice also applies where the carriage is partly by land and partly by sea (*Harding v. Bussell*, overruling *Village Co. v. Stearns*, 5 Com. Ca. 246, and also *Henderson v. Underwriters' Association*, (1891) 1 Q. B. 557, if it was intended to lay down a different rule); not where it is wholly inland transit *Tannenbaum v. Heath*, *supra*, approving *Schloss v. Stevens*, 10 Com. Ca. 224. It does not extend to other insurances, for instance, fire insurance, *ibid*.

Further, the right extends to documents in the possession of any persons interested, that is, persons on the same side as the plaintiffs, although they are not parties to the action, and whether they are the property of these persons jointly with the plaintiffs or their sole property (*London and Provincial Co. v. Chambers*, 5 Com. Ca. 241), and there is a form of order given in App. K, No. 19 (and see Chitty F., p. 262), the blank in which may be filled up generally, "the plaintiffs and all persons interested in these proceedings and in the

O. 31, r. 12. insurance the subject of this action," see *China Co. v. Commercial Co., supra*, and *West of England Bank v. Canton Co.*, 2 Ex. D. 472.

No affidavit is necessary on the application (*China Co. v. C. Co., supra*).

The object of the stay is only to put the plaintiffs under the necessity of making every effort to get the documents where they are not under their own control; if the plaintiffs produce all that they can get, and show that they have *bonâ fide* done all they can (see *London and Provincial Co. v. Chambers, supra*) to discover and get the other documents, if any, the stay will be taken off, *ibid.* and see *Willis v. Baddeley*, r. 12 (n.), "Persons suing in other persons' names." Where the other parties interested are out of the jurisdiction and not under the plaintiff's control, it seems that no stay will be directed (*Fraser v. Burrows*, 2 Q. B. D. 624).

The underwriters are entitled to an order of the same nature where, as plaintiffs, they are seeking to recover back from the assured over-payments, alleged to have been procured by their misstatements (*Boulton v. Houlder*, (1904) 1 K. B. 784).

"Relating to any Matter."—See (nn.) on these words to r. 14.

"Refuse, adjourn . . . not necessary . . . limited to certain classes of documents."—Under the original rule the order was almost matter of course or of right: under the rule after the addition of these words (and still more since the addition of the proviso at the end) there is a real (but judicial, and therefore subject to appeal, *Williams v. Bird*, 34 Sol. Jo. 347) discretion to refuse it, where the Court can see that no good is reasonably to be expected from ordering it, or to limit it; and in order to see whether there may be material documents, the pleadings, affidavits and any proceedings in the action may be looked at, and the Court ought not to require affidavits in support of the application; see *Downing v. Falmouth Board*, 37 C. D., p. 242, where it was limited to particular documents; and see Lindley, L.J., in *Re Wills' Trade Mark*, (1892) 3 Ch. 207. Or leave might be given to interrogate (*A.-G. v. North Met. Tram. Co.*, cited *supra*, p. 43). Or an order for inspection of particular documents may be made, see *Pardy's Mozambique Synd. v. Alexander*, *infra*, r. 14 (n), "It shall be lawful."

See also (nn.) "Not sufficiently material at that stage," "oppressive," to r. 6; and "it shall be lawful" to r. 14.

Conclusiveness of Affidavit.—Upon application for Production.—

The party's oath that a particular document is irrelevant is conclusive against ordering its production, unless the Court is satisfied from certain sources that in spite of his oath to the contrary, the document is relevant; mere suspicion derived from these sources, although sufficient to justify the Court in ordering a further affidavit (see *infra*), does not entitle the Court to order production: when, therefore, the further affidavit has been made and the relevancy is clearly denied, the Court can go no further, it cannot disregard his oath unless reasonably satisfied of its untruth: the affidavit is similarly conclusive in the case of documents admittedly relevant, for which protection is claimed: so far as regards any statement of fact: see as to the sources and generally, (n) "conclusiveness of claim," p. 24. As to what description is necessary, see r. 13 (n.) "Sufficient description." Under the new rule 19A the Court can inspect the documents; before this the Court sometimes by consent inspected the documents, and no appeal would then lie: but see Cotton, L.J., in *Re Holloway*, 12 P. D. p. 169, on this practice.

Upon Application for further Affidavit.—(See now the new rule 19A, under which a further affidavit can be ordered as to particular documents.) The Court is not restricted to requiring from a party one affidavit of documents only: it may require another at any time if it is not unreasonable to suppose (*Esher, M.R.*, in *Comp. Financ. v. Peruvian Guano Co.*, 11 Q. B. D. p. 63), from certain sources

(discussed in (n.) "Conclusiveness of claim," p. 24), or there is a reasonable probability or presumption or ground for suspicion derived from such sources, that he has other relevant documents in his possession: Cotton, L.J., in *Lyell v. Kennedy*, 27 C. D., p. 20; *Hall v. Truman*, 29 C. D., p. 319. Unless the affidavit is shown from these sources to be insufficient no further affidavit can be ordered; the opponent cannot (except under r. 19A) show by a contentious affidavit that it is insufficient: *Jones v. Montevideo Gas Co.*, 5 Q. B. D. p. 558. In *James v. Plummer*, 23 L. J. N. C., 107, it was held that documents coming into the party's possession after the making of the first affidavit need not be scheduled. Cases:—*Comp. Financ. v. Peruvian Co.*, 11 Q. B. D. 55, where documents referred to in a minute-book might, it was held, be material if the defendants' contention were correct, although they would not be if the plaintiffs' contention were correct (see as to this, (n.) "Irrelevant" to r. 6, *supra*) and a further affidavit was ordered: *A.-G. v. Newcastle*, (1897) 2 Q. B. 384, claim by Crown to part of the foreshore and bed in a port, the defendants having discovered only the documents relating to the part claimed by the Crown, were ordered to make a further affidavit of documents relating to the rest of the foreshore and bed: the further affidavit was made and their production was discussed by the C. A. (1899), 2 Q. B., p. 478: *Kent Coal Co. v. Duguid*, (1910) A. C. 452, further affidavit as to Co.'s books, their balance sheets having been scheduled to affidavit.

See also (n.) "Further affidavit" to r. 13, *infra*.

Upon Application to interrogate or for further Answer as to Documents or their Contents.—(a) **Omission of Relevant Documents.**—When the affidavit of documents is technically sufficient so as that no further affidavit can be ordered, the party's only resource was to attempt to get the necessary admissions of possession and relevancy as to undisclosed documents by interrogatories: but see now the new r. 19A (3), and see also the latter part of r. 18. Only, however, if the Court were satisfied that there might be some specified relevant documents in the party's possession, and a *prima facie* case were shown, would an interrogatory be allowed, anything beyond this being held to amount to a cross-examination on the affidavit of documents which was not permissible (*Hall v. Truman*, 29 C. D. 307; and see *Nicholl v. Wheeler*, and *Morris v. Edwards*, *infra*). In *Shrewsbury v. S.*, 80 L. T. Jo. 66, and *Ross v. Holman*, 5 Times Rep. 505, interrogatories were allowed.

(b) **To falsify the Claim to Protection.**—(See as to the conclusiveness of the claim as regards an order for production note on this point, *supra*), *Nicholl v. Wheeler* (17 Q. B. D. 101) and *Morris v. Edwards* (23 Q. B. D. 287, 15 A. C. 309) show that it is rarely permissible to interrogate for this purpose and upon similar grounds, namely, that it amounts to a cross-examination upon the affidavit of documents; but *qu.* as to the soundness of these decisions, see Article 40, *supra*.

Forms.—Application, Chitty F. p. 247; D. C. F. pp. 965, 966; Order, Chitty F. p. 257; Seton, pp. 52—56.

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it shall be in the Form No. 8 in Appendix B., with such variations as circumstances may require.

"Which he objects."—See (n.) "Grounds on which discovery resisted," p. 24.

"Shall be in the Form."—See forms *infra*; *Welsh Steam Co. v.*

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Affidavit of
documents.

O. 31, r. 13 *Gaskill*, 36 L. T. 352; and see r. 12 (n.) "Possession or power," generally and as to the party's obligation to search for and examine documents.

See as to affidavit by co-plaintiffs, r. 12 (n.) "Co-plaintiffs."

Sufficient description of Documents.—It is sufficient if the documents are described in such a manner as to enable production, if ordered, to be enforced (*Taylor v. Batten*, 4 Q. B. D. pp. 87, 88; *Budden v. Wilkinson* (1893) 2 Q. B. 432). The proper practice where they are numerous is to tie them up in bundles, to schedule the bundles, and number the documents, or otherwise ear-mark them in such a way that the other party may ask for those which he wants to see (see *Hill v. Hart-Davis*, 26 C. D. 470, 472; *Walker v. Poole*, 21 C. D. p. 836; *Price v. P.*, 48 L. J., Ch. 215; *Corp. of Bristol v. Cow*, 26 C. D. p. 681; *Kain v. Farrer*, 37 L. T. p. 471; *Taylor v. Batten*, p. 88); you must (but not necessarily where privilege is claimed, see next paragraph) describe what the documents are, for instance, letters from A. to B., so that the adversary may be able to say if he wants to see them (Kay, L.J., in *Cooke v. Smith*, (1891) 1 Ch. 509, referring to *Hill v. Hart-Davis*, *supra*). If the documents are described at unnecessary length the party may be ordered to pay the unnecessary costs so occasioned thereby, or even the affidavit may be taken off the file as being prolix or oppressive; see *Hill v. Hart-Davis*; *Walker v. Poole*; and *Bolton v. Natal Co.*, W. N. (87), 143, 178, where a number of letter-books and bundles of documents were scheduled without distinguishing which were relevant.

In the case of documents for which protection is claimed identification (as above), but no description, is necessary (*Budden v. Wilkinson*, (1893) 2 Q. B. 432, following *Taylor v. Batten*, *supra*); except so far as may be necessary to support the claim to protection, and as to what description is necessary to protect a party's evidences, see *supra*, p. 36. If words are used which, if true, protect the documents, no further particularity is necessary than in the case for which protection is not claimed (*Taylor v. Batten*, p. 88). The adversary has no right to such a description of the documents as may enable him to test the truth of the affidavit, *ibid.* p. 88. Where privilege is claimed for letters it is not necessary to state the dates or the names of the writers, nor such other particulars as might enable the opponent to discover indirectly the contents (*Gardner v. Irvin*, 4 Ex. D. p. 53; and see *Kain v. Farrer*, 37 L. T. p. 470). An affidavit ought not to say that the documents are privileged, which is a statement of law, but ought to set out the facts from which the Court can see that the party's view of the law is right (*Gardner v. Irvin*, pp. 52, 53). See (n.) "Further affidavit," *infra*, as to insufficient description.

Further Affidavit.—See as to further affidavit on ground of omission of relevant documents, (n.) "Application for further affidavit," *supra*.

Where the affidavit is insufficient in form a further affidavit will be ordered (see (n.) "Shall be in the form," *supra*).

Where protection has been insufficiently claimed the party is, as a rule, allowed to make a further affidavit for the purpose of making good his claim to protection; and so also if the affidavit does not sufficiently show which documents are entitled to protection he will be allowed to make a further affidavit to identify those entitled to protection (*Taylor v. Batten*, 4 Q. B. D. p. 88; *Kain v. Farrer*, 37 L. T. p. 471; *Bulman v. Young*, 31 W. R. 766; *Roberts v. Oppenheim*, 26 C. D. p. 733; *Kennedy v. Lyell*, 8 App. Cas. p. 229).

Forms.—Application for extension of time, D. C. F. pp. 967, 971. Affidavit, Chitty F. pp. 248-9; D. C. F. p. 967. Objections to produce, Chitty F. pp. 250-4. Application for leave to seal up, D. C. F. p. 971. Order for ditto, Seton, pp. 52-3. Claim to seal up, Chitty F. p. 255; D. C. F. p. 972. Application for further affidavit, Chitty F. p. 255;

D. C. F. pp. 969, 970. Order for ditto, Chitty F. p. 257; Seton, p. 57. Further affidavit, Chitty F. p. 255.

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rr. 13, 14.

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Production of
documents.

14. It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

"It shall be lawful."—It was held that there was no discretionary power under this rule to refuse the production of documents material at that stage, unless they fell within the established rules of protection existing in chancery, the wide discretionary power existing at common law no longer obtaining (*Bustros v. White*, 1 Q. B. D. p. 426; *Anderson v. Bank of Columbia*, 2 C. D. pp. 654, 656): but this must now be taken as subject to the special discretion given by the proviso added to r. 18, see (n.) "Not necessary" to that rule and *Hope v. Brash* there cited; and see generally as to the right of discovery, (n.) "Grounds on which discovery can be resisted," and (n.) "The effect of the J. A. and rules," *supra*, p. 24.

No order for production of a document can be made against a party unless he has directly or indirectly admitted both possession and relevancy: see Articles 31 and 32, *supra*. But where its contents or effect are known to the Court the Court can judge of its relevancy. The Court can also inspect it under r. 19A.

Where one of several defendants obtains from the plaintiff an affidavit of documents the Court can, under this rule, order production to any other defendant of documents the possession and relevancy of which is admitted by the plaintiff in such affidavit, without the machinery of a fresh affidavit of documents and a deposit by the defendant for that purpose (*Pardy's Synd. v. Alexander*, (1903) 1 Ch. 191); but only of documents relevant to the matters in question between himself and the plaintiff (*ibid.*, and see (n.) "Any matter in question," *infra*).

"At any time during the pendency."—See r. 1 (n.) "Time or stage for discovery."

"Cause or Matter."—See r. 1 (n.) "In any cause or matter."

"Party."—See r. 12 (n.) "Any party."

"Possession or Power."—Possession or power for the purpose of justifying an order for production has a narrower meaning than for the purpose of inclusion in an affidavit of documents (see r. 12 (n.) "Possession or power," *supra*); for the purpose of an order for production it means sole legal possession, a right and power to deal with them (*Kearsley v. Philipps*, 10 Q. B. D. 36, 40; and before the C. A., *ibid.* p. 465); the sole property in them (*Murray v. Walter*, Cr. & Ph. 114); joint possession with other persons is not sufficient (*ibid.*). Where the document is not in the party's sole legal possession it is sufficient for him to state the fact; it is not necessary to allege or show the refusal of the co-owners (*Kearsley v. Philipps*, 10 Q. B. D. 36, 465); but he must state their names and the nature of their ownership (*Bovill v. Cowan*, L. R. 5 Ch. 495). The mere interest of another person in the document is not sufficient to prevent an order for production; he must have an actual property in it or right of possession. The lien of another person would prevent an order being made, but in the particular case where documents are in the hands of a former solicitor who claims a lien upon them and refuses to give them up, the order for production will be made, reserving liberty to apply in case the

O. 31, r. 14. party really cannot obtain them (*Lewis v. Powell* (1897) 1 Ch. 678); but in *Re Caudery*, (1910) 54 Sol. Jo. 444, Swinfen Eady, J., following the principle laid down in *Re Hawkes*, (1898) 2 Ch. p. 7, that a solicitor as an officer of the court has no greater right than his client to refuse production, ordered the solicitor to deliver up to the receiver appointed in an administration action papers over which he had a lien, which came into his possession before suit. See Bray, p. 195, as to party's agent refusing production.

Cases.—*Kearsley v. Philipps*, 10 Q. B. D. 36, 465, one of two trustees of a mortgage. *Vivian v. Little*, 11 Q. B. D. 370, lunatic's committee and deeds in custody of court; but see Vol. II., Pt. IV., "Lunatics," as to application in lunacy to the court in such a case. *Gowan v. Briggs*, 39 Sol. Jo. 330, receiver under a mortgage deed. *Reid v. Langlois*, 1 M. & G. 627, and *Hadley v. McDougall*, L. R. 7 Ch. 312, one partner and the partnership documents. *O'Shea v. Wood*, (1891) P. 286, documents belonging to solicitor of party. *Williams v. Ingram*, 16 Times Rep. 434, 451, directors and the company's documents. *London, &c., Bank v. Cooper*, 15 Q. B. D. 7 : 473; documents in possession of liquidator of dissolved company ordered to be produced, for he had absolute control of them.

Production by interested Persons.—See r. 12 (n.), *supra*.

"Relating to."—Documents are relevant which contain information which may either directly or indirectly enable the party seeking discovery either to advance his own case or damage (see (n.) "Impeaching or destroying adversary's case," *supra*, p. 35) that of his adversary, or which may fairly lead him to a train of inquiry which may have either of these two consequences (see Esher, M.R., in *Comp. Fin. v. Peruvian Guano Co.*, 11 Q. B. D. p. 63). They are not confined to such as would be admissible in evidence (see *ibid.* p. 62, Jessel, M.R., in *Bustros v. White*, 1 Q. B. D. p. 425; and Blackburn, J., in *Hutchinson v. Glover*, 1 Q. B. D. p. 141). Every document which will throw any light on the case is relevant, *ibid.* p. 141. Documents required merely for the purpose of comparing handwriting may be relevant (*Jones v. Richards*, 15 Q. B. D. 439, libel action; and see *Wilson v. Thornbury*, L. R. 17 Eq. 517). See also r. 7 (nn.) "Irrelevant," "Not sufficiently material at that stage," and *Elkin v. Clarke*, and *Schreiber v. Heymann*, there cited; and "Oppressive."

"Any Matter in question."—As to whether a party can be compelled to give discovery relating to matters in question between the applicant and some other party, see r. 7 (n.) "Irrelevant," and generally see that note and (n.) "Not sufficiently material at that stage" to that rule.

Documents in which the Applicant has a Property, including *manor documents and tenants of manor, corporation documents and members of corporation, other public documents, companies' documents and shareholders, title deeds and remaindermen, documents the common property of both parties and within the common law equitable jurisdiction as to inspection*, see generally Bray, pp. 271—297; recent cases, *Holland v. Dickson*, 37 C. D. 669; *Mutter v. Eastern Co.*, 38 C. D. 92; and *Davies v. Gas L. & C. Co.*, (1909) 1 Ch. 248; 708, C. A. (inspection of register under Comp. Cl. Acts, 1845 and 1863; *Bank of Bombay v. Suleman*, 199 L. T. 62 (only where some definite object): *Nelson v. Anglo-American Co.*, (1897) 1 Ch. 130; *Re Balaghat Co.*, (1901) 2 K. B. 665, overruling *Boord v. African Co.*, (1898) 1 Ch. 596, *Re North Brazilian Co.*, 37 C. D. 83, and *Re Glamorgan Co.*, 28 C. D. 620 (inspection under Comp. Consol. Act); *Re West Devon Mine*, 38 C. D. 51 (Stannaries Act); (n.) "Trustee and c. q. t.," p. 28; and r. 19 as to tenants of manor. As to inspection in lunacy, see Vol. II., Ann. Pr.

Place of Production.—According to the old practice in chancery the primary obligation of the party was to deposit his documents at the

Record and Writ Clerk's office (now the Central Office); it afterwards grew to be the practice, but only as a matter of indulgence to him, to allow him to produce them at the office of his solicitor, that is, of the London solicitor where notices have to be served; and this is still so in the C. D.; in the K. B. D., the old common law practice under which the office of the solicitor was the primary place for production, there being no place where the documents could be deposited, still obtains (*Brown v. Sewell*, 16 C. D. 517; *Prestney v. Mayor of Colchester*, 24 C. D. p. 379; and see *Leslie v. Cave*, W. N. (86) 162, where the documents were ordered to be deposited in court).

As a further indulgence production is sometimes allowed at other places; see, for instance, r. 17, as to offering inspection of business books, etc., at their usual place of custody: *Prestney v. Mayor of Colchester*, 24 C. D. 379, where inspection was allowed at Colchester of the books of the corporation with liberty to the plaintiff to apply with reference to any particular documents which he might desire to inspect in London, at the defendant's expense: *Bustros v. B.*, 30 W. R. 374, plaintiff's documents at Beyrout and Alexandria to be inspected at those places; so at Japan, in *Whyte v. Ahrens*, 32 W. R. 649.

Costs of Production and Inspection.—It is believed that the intention of the new rule O. 65, r. 27 (17) (January, 1902), was to give the Master a discretion to allow costs which formerly could not be allowed; the rule for which this was substituted was held to apply only to solicitor and client taxation (*Wicksteed v. Biggs*, 52 L. T. 428). As to the old practice see *Brown v. Sewell*, 16 C. D. pp. 518, 519, and see (n.) "Place of Production," *supra*. See as to the costs of copies, notes to O. 65, r. 27 (18).

Taking Copies of Inspection.—The right to inspection includes the right to have or take (or make, see *Ormerod v. St. George's Ironworks*, (1905) 1 Ch. 505) copies of the documents (see *Pratt v. P.* 47 L. T. 249, *Bevan v. Webb*, (1901) 2 Ch. D. p. 74); but where inspection is by order hereunder there is no right to make them, see new form of order in App. K., No. 18, and O. 65, r. 27 (18); for cases under Comp. and Comp. Cl. Acts, see *supra*.

Under this rule the Court can order exact copies to be taken by photographing the documents (*Lewis v. Londesborough*, (1893) 2 Q. B. 191, bills of exchange alleged to be forged).

Persons to Inspect.—The rule in chancery was (see forms referred to under rr. 13 and 18), and still is in the Chancery Division, to order production to the party, his solicitors or agents.

Inspection under r. 15, *infra*, is given to the party or his solicitor.

Agent.—The meaning of the word "agent" was discussed in *Draper v. Manchester Co.*, 3 D. G. F. & J. 23, and *Bonnardet v. Taylor*, 1 J. & H. pp. 385, 386; it certainly does not mean an agent *pro hac vice*; *ibid*.

See as to the right, apart from litigation, of a principal to have his agent's books abroad inspected by a person of his selection, *Dadswell v. Jacobs*, 34 C. D. 278, or of a partner to have the partnership books inspected by an agent, *Bevan v. Webb*, (1901) 2 Ch. 59.

Under special circumstances special persons would be allowed to inspect, for instance, accountants or scientific experts (*Bonnardet v. Taylor*, 1 J. & H. 383; *Swansea Co. v. Budd*, L. R. 2 Eq. 274; *Lindsay v. Gladstone*, L. R. 9 Eq. 132; *Rep. Peru v. Weguelin*, 41 L. J., Ch. 165).

Sealing up parts of Documents.—Generally speaking, any part of a document may be sealed up or otherwise concealed under the same conditions as a whole document may be withheld from production (as to which see (n.) on p. 50); the party's oath for this purpose is as valid in the one case as in the other. The practice is either to schedule to the affidavit of documents those parts only which are relevant, or to schedule

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the whole document and to seal up those parts which are sworn to be irrelevant; the old practice in chancery of getting liberty to seal up and unseal is certainly not adhered to in the K. B. But where books are in constant use, a party will not be compelled to seal up (with liberty to unseal and reseal) the irrelevant parts in order to protect them: he will be allowed to cover them up during the inspection, subject, if thought necessary, to the obligation of making an affidavit afterwards that no relevant parts have been covered up (*Graham v. Sutton & Co.*, (1897) 1 Ch. 761). See generally, *Bray*, pp. 233—238, and *Jones v. Andrew*, 58 L. T. 601, where it was held that the mere fact that a few unimportant portions of sealed-up matter ought not to have been sealed up was not sufficient to authorize the unsealing of the whole. See a special order in a partnership action, *Pickering v. P.*, 25 C. D. 247. See forms (nn.) to r. 13.

Forms.—See forms referred to under r. 18.

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Inspection of documents referred to in pleadings or affidavits.

15. Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice, in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

The Scope and Object of this Rule and the following Rules 16—18.—It may be doubted whether this Rule was ever intended to apply to documents merely disclosed in an affidavit of documents or even in answers to interrogatories, and so expose the party and in particular the plaintiff to the penalty of being unable to put them in evidence: see Article 66, *supra*: but that is the construction put upon these rules, see (n.) “Affidavits,” *infra*.

There is a broad distinction between an application for general discovery of documents and an application for production of documents referred to in the pleadings; these rules were intended to give the opposite party the same advantage as if the documents had been fully set out in the pleadings; the party against whom the application is made must give immediate production of documents referred to in his pleadings or affidavits unless he can shew good cause why he should not (*Quilter v. Heatley*, 23 C. D. pp. 48—51).

But these rules do not take away any right which, apart from these rules, the party would have to protect the document from inspection; in such a case he will not be compelled to produce it, but he will become subject to the penalty of not being at liberty to put it in evidence (*Roberts v. Oppenheim*, 26 C. D. 724), where the plaintiffs claimed, and were allowed, protection for deeds referred to in their statement of claim as relating only to their own title, &c. So in *Milbank v. Milbank*, (1900) 1 Ch. 376, the defendant was held not bound to produce a conveyance to himself, but he must give by way of particulars the date of and the consideration for the transaction. Nor can he be ordered to

produce documents not in his possession (*Quilter v. Heatley*): and see r. 14, (n.) "Possession or power."

Application should be made for an order for production if it is desired to take advantage of the penalty, see *Quilter v. Heatley*, *supra*, commenting on *Webster v. Whewall*, 15 C. D. 120.

"Every party . . . Any other Party."—See r. 12 (n.)—See r. 12 (n.) "Any party."

"Cause or Matter."—See r. 1, (n.) "In any cause or matter."

"At any Time."—See r. 1, (n.) "Time or stage for discovery."

"Pleadings."—See the definition in J. A. s. 100. Particulars are pleadings for the purpose of this rule (*Cass v. Fitzgerald*, W. N. (84) 18; and see *Williams, L.J.*, in *Milbank v. Milbank*, *supra*).

"Affidavits."—"Affidavits" has been held to include answers to interrogatories (*Moore v. Peachey*, (1891) 2 Q. B. 707), and has been considered to include affidavits of documents, but *qu.* see (n.) "Scope and object," *supra*. In *Hunter v. Dublin Co.*, 28 L. R. Ir. 489, it was held that a document referred to in any affidavit must be produced under r. 18, unless special cause shewn. An affidavit not on the file, but of which a copy had been given to the other side, is included (*Re Fenner and Lord*, (1897) 1 Q. B. 667). See also *Pardy's Synd. v. Alexander*, r. 14, (n.) "It shall be lawful."

"Reference is made."—The documents need not be identified or particularly described, it is sufficient if they are referred to generally (*Smith v. Harris*, 48 L. T. 869; *Re Credit Co.*, 11 C. D. 256). Where entries in a book are referred to, inspection will be limited to those entries (*Quilter v. Heatley*, 23 C. D. 42). Where letters are referred to, production cannot be ordered of copies not referred to (*ibid.*, p. 49). An exhibit is part of the affidavit, and any person entitled to see the affidavit is entitled to see the exhibit (*Re Hinchcliffe*, (1895) 1 Ch. 117). But this has no application to the case laid before counsel and his opinion exhibited to an affidavit filed under O. 16, r. 24, in support of an application to sue *in forma pauperis*, and the opposite party is not entitled to see it (*Sloane v. Britain Co.*, (1897) 1 Q. B. 185). See as to exhibits to depositions (n.) "*Publici juris*," p. 29.

"His Solicitor."—See r. 14, (n.) "Persons to inspect," *supra*.

"Copies."—See r. 14, (n.) "Taking copies," *supra*.

"To put any such Document in Evidence unless."—See (n.) "Scope and Object," *supra*.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 9 in Appendix B, Part II., with such variations as circumstances may require.

See (nn.) to r. 15, *supra*.

The very words need not be followed (*Re Credit Co.*, 11 C. D. 256).

Forms.—App. B., Part II., No. 9.: Chitty F. p. 259; D. C. F. p. 970; and at trial or on examination of witnesses, D. C. F. p. 977.

358.

Notice to produce.

17. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice,

359.

Time for inspection when notice given under rule 15.

O. 31,
rr. 15—17.

**O. 31,
rr. 17, 18.**

Bank and
trade books.

deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in the Form No. 10 in Appendix B, with such variations as circumstances may require.

See notes to r. 15, *supra*.

This rule has no application where an order for production at a specified place has already been made (*Lloyds Bank v. Luck*, W. N. (01) 130).

"Documents."—This rule is not confined to cases where there has been an affidavit of documents: it applies to all the documents mentioned in r. 15 (*Re Fenner and Lord*, (1897) 1 Q. B. 667).

"Office of his Solicitor."—See (n.) "Place of production" to r. 14.

"Bankers' Books, &c."—See *ibid.*, and (n.) "Bankers' Books Evidence Act," O. 37, r. 7 (n.), *post*. See as to business books, r. 19A.

Forms.—Chitty F. p. 259; D. C. F. pp. 973, 976.

**360.
Order for
inspection.**

18. (1.) If the party served with notice under Rule 17 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the *Court or Judge* may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit: *Provided that the order shall not be made when and so far as the Court or a Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.*

(2.) Any application to inspect documents, except such as are referred to in the pleadings, *particulars*, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. *The Court or Judge shall not make such order for inspection of such documents when and so far as the Court or Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.*

R. S. C. Nov. 1893, r. 14, substituted for O. 31, r. 18 (1883). The words in italics are new, and the rule is recast.

See r. 15 (nn.) and generally as to production r. 14 (nn.).

"Affidavit showing . . . Party entitled to inspect . . . and in Possession of other Party."—It is conceived (and see Williams, J., in *Wiedman v. Walpole*, 24 Q. B. D. 537) that it is open to the other party to file an affidavit denying possession or relevancy or claiming protection, and that the statements in such affidavit must be accepted as no less conclusive than if they were contained in an affidavit of documents, as to which see (n.) "Conclusiveness of Affidavit," *supra*, p. 50.

The old common law right to inspect documents the common property of both parties (see r. 14, (n.) "Documents in which applicant has a property"), is still in force (*Brown v. Liell*, 16 Q. B. D. 229).

**O. 31,
rr. 18—19a.**

"Not necessary."—This discretionary power was not in existence when *Bustros v. White*, cited under r. 14, was decided, as pointed out in *Hope v. Brash*, (1897) 2 Q. B. 188; and see (n.) "Grounds on which discovery can be resisted," *supra*, p. 24.

Forms.—Application, Chitty F. p. 260; D. C. F. pp. 973–7. Affidavit, Chitty F. p. 261; D. C. F. p. 974. Order, Chitty F. p. 262; Seton, pp. 52–62. As to deposit of documents in Court, D. C. F. pp. 977, 979–980; Seton, pp. 53, 60, 97–8.

19. An order upon the lord of a manor to allow limited inspection of the court rolls may be made on the application of a copyhold tenant, supported by an affidavit that he has applied for inspection and that the same has been refused.

361.
Inspection of
court rolls.

See r. 14, (n.) "Documents in which applicant has a property."

Forms.—Affidavit on application, Chitty F. p. 261.

19A. (1.) Where inspection of any business books is applied for, the Court or a Judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the Court or a Judge may order inspection of the book from which the copy was made.

Verified copies.

Forms.—Application, D. C. F. p. 975. Order, Chitty F. p. 264. Affidavit, Chitty F. p. 265.

(2.) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a Judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

"Privilege."—This includes any objection to inspection: for instance, irrelevancy (*Ehrmann v. Ehrmann*, (1896) 2 Ch. 826).

"Document."—This includes a sealed-up portion of a document (*Ehrmann v. E.*, *supra*, and *Ainsworth v. Wilding*, (1900) 2 Ch. 315).

Forms.—Notice to produce for Master's inspection; Chitty F. p. 260.

(3.) The Court or a Judge may, on the application of any party to a cause or matter at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom

O. 31,
rr. 19a—21.

the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them.

R. S. C. Nov. 1893, r. 15. The whole of this rule is new.

"May."—A *prima facie* case of relevancy and possession of specific documents is sufficient to entitle the applicant to the order: for instance, documents referred to in documents scheduled to the affidavit of documents or in documents produced as a matter of courtesy (*Ormerod v. St. George's Ironworks*, 95 L. T. 694). Nor does the question of privilege arise on this application, but on the subsequent application for inspection (*ibid.*).

"State by Affidavit."—The statements are, it is conceived, as conclusive as if they were in an affidavit of documents (see r. 18, (n.) "Affidavit showing").

"Specific."—They must be documents which can be named and specified, see *White v. Spafford*, (1901) 2 K. B. 241, where an order was refused without prejudice to an application for leave to interrogate: and *Graves v. Heinemann*, 18 Times Rep. 115, following that case.

Forms.—Application, Chitty F. p. 255; D. C. F. p. 976. Affidavit in support, Chitty F. p. 256. Affidavit pursuant to order, Chitty F. p. 256. Order, Seton, p. 56; Chitty F. p. 258.

362.

Premature
discovery.

20. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

The making of the common order under r. 12 does not preclude an order being subsequently made under this rule (*De Carteret v. Land*, &c., 70 L. T. 323; *Lever v. do.*, 42 W. R. 104).

This rule applies to mixed questions of law and fact (*Tasmanian Co. v. Clark*, 27 W. R. p. 678).

See r. 6, (n.) "Not sufficiently material at that stage" *supra*.

See generally as to trials of preliminary issues, O. 36, r. 8.

Forms.—Application, D. C. F. pp. 958, 971.

363.

Non-compliance with
order for
discovery.

21. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly.

This rule does not apply to an order for accounts under O. 15, or for disclosure of partners under O. 16, r. 14 (*Pike v. Keene*, 24 W. R. 322).

"Liable to Attachment."—(See O. 44.) Where a party is shewn

not to be in a condition to make an affidavit, the court will not attach him (Cotton, L.J., *Wilson v. Raffalovitch*, 7 Q. B. D. p. 561).

On getting notice of motion for attachment against him the party must, if he wish to prevent the motion being brought on, not only file his affidavit of or give discovery, but he must tender a fixed sum for costs or offer to pay the taxed costs: see Jessel, M.R., in *Thomas v. Palin*, 21 C. D. p. 363. See further, the cases cited *infra*.

Service of Order for Discovery.—The copy order served must be indorsed under O. 41, r. 5 (*Hampden v. Wallis*, 26 C. D. 746); nor is the irregularity waived by taking out a summons for time (*ibid.*).

Notice of Motion for Attachment.—This must comply with O. 52, r. 4 (*Litchfield v. Jones*, 25 C. D. 64).

Cases.—*Thomas v. Palin*, 21 C. D. 360; *Litchfield v. Jones*, 25 C. D. 64; *Price v. P.*, 48 L. J., Ch. 215; *Gay v. Hancock*, 56 L. T. 726; *Re Mulcaster*, 26 W. R. 434; *Joy v. Hadley*, 22 C. D. 571.

"Dismissed for want of Prosecution."—(See O. 27.) An order will not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid a fair discovery (*Dauvillier v. Myers*, W. N. (83) 58: and see *Rep. Liberia v. Roye*, 1 A. C., p. 143, commented on in *James Nelson v. Nelson*, (1906) 2 K. B. 217). Where an answer is not so palpably insufficient as to shew want of *bona fides*, the proper course is to proceed under r. 11 (*Kennedy v. Lyell*, W. N. (82) 137). Where the plaintiff is not in a condition to make an affidavit of documents the Court would not dismiss the action (*Wilson v. Raffalovitch*, 7 Q. B. D. p. 561; and *Cardwell v. Tomlinson*, 52 L. T. 746).

Where one member of a plaintiff firm refused to give discovery, it was held that another member might apply for attachment against him to prevent the action being dismissed (*Seal v. Kingston*, (1908) 2 K. B. 579, C. A.).

Where order directs that in default of answer judgment may be signed, a certificate of such default (obtained from filing department) is sufficient authority to enter judgment, P. M. R. (17), Vol. II., Ann. Pr.

Stay until Discovery made by Other Persons.—See r. 12, (n.) "Discovery from interested persons," *supra*.

"His Defence Struck Out."—(See O. 27, rr. 11—15 (nn.)). In *Haigh v. H.*, 31 C. D. 478, defence was struck out, judgment in default given, and motion to set aside judgment under O. 27, r. 15, refused, because the default was wilful. See also *Fisher v. Hughes*, 25 W. R. 528, and *Gibson v. Sykes*, 28 Sol. Jo. 533.

Order.—The order may be to strike out defence and sign judgment (but see *Jenney v. Mackintosh*, 61 L. T. 108) if the discovery is not made within a specified time, and this order need not be served (*Farden v. Richter*, 23 Q. B. D. 124; *Fisher v. Hughes*, 25 W. R. 528; and see *Salomon v. Hole*, 53 W. R. 588, as to form of order in C. D.).

Forms.—Attachment, see r. 23. Application to dismiss or strike out, Chitty F. p. 282; D. C. F. pp. 962, 981; Seton, pp. 96, 135. Order, Chitty F. p. 283.

22. Service of an order for interrogatories or discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may shew in answer to the application that he has had no notice or knowledge of the order.

See *Hampden v. Wallis*, 26 C. D. 746, cited *supra*, under r. 21, and *Re Tuck*, (1906) 1 Ch. 692.

O. 31,
rr. 21, 22.

364.
Service on
solicitor on
order for
discovery.

O. 31,
rr. 23—26.

365.

Attachment of
solicitor.

23. A solicitor upon whom an order against any party for interrogatories or discovery or inspection is served under the last preceding rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

See r. 21, (n.) "Liable to attachment."

Cross References.—Attachment, O. 44; Service on Solicitor, O. 67, r. 8. Forms.—Chitty F. p. 283; D. C. F. pp. 962, 981.

366.

Using answers
to interro-
gatories at
trial.

24. Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

See *Lyell v. Kennedy*, 27 C. D. pp. 15 and 29.

367.

Security for
costs of
discovery to be
given.

25. In every cause, or matter, the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the court or a judge, be secured in the first instance as provided by rule 26 of this order, by the party seeking such discovery, and shall be allowed as part of his costs where, and only where, such discovery shall appear to the judge at the trial, or, if there is no trial, to the court or a judge, or shall appear to the taxing officer, to have been reasonably asked for.

As to costs of discovery, see r. 3, *supra*.

"Interrogatories or Otherwise."—This rule does not apply to "inspection," under rr. 15 and 18 (*Moore v. Peachey*, (1891) 2 Q. B. 707, application for inspection of documents referred to in answers to interrogatories: *Cass v. Fitzgerald*, W. N. (84) 18; and see rr. 20, 21, and 22, where discovery and inspection are spoken of. But inspection may be refused if the Court thinks that it is an improper attempt to evade the necessity of making a deposit (*Moore v. Peachey*, *supra*, and *Parry's Synd. v. Alexander*, r. 14, (n.) "It shall be lawful"). It does not apply to the old practice at common law as to inspection (*Brown v. Liell*, 16 Q. B. D. 229): nor to an order for ship's papers against underwriters (*Law v. Budd*, W. N. (83) 166). The practice is not to apply it to an affidavit under r. 19A (3).

"Shall unless otherwise ordered."—See r. 26.

368.

Mode of giving
security for
costs of
discovery.

26. Any party seeking discovery by interrogatories or otherwise may be ordered upon making application for discovery to pay into court to a separate account in the action to be called "Security for Costs Account," to abide further order the sum of 5*l.*, or any less sum, and may be ordered further to pay into court such additional sum as the court or a judge shall direct. The party seeking discovery shall, with his interrogatories or order for discovery, serve a copy of the receipt for the said payment into court, and the time for answering or making discovery shall in all cases commence

from the date of such service. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made. **O. 31, r. 26.**

See also (nn.) to r. 25.

"May be Ordered."—It is now discretionary, and unless ordered it is not required. Under the old rule it was always required unless the circumstances were exceptional. The deposit was said to be intended for the protection of the clients themselves, and was not imposed solely for the benefit of the party from whom the discovery was sought; the liability to make deposit could not be waived by the other party, and the judge was not bound to dispense with it and "order otherwise" simply because the parties chose to agree that there should be none (*Aste v. Stumore*, 13 Q. B. D. 326; *Hall v. Liardet*, W. N. (83) 175). There was a discretionary power to dispense with the deposit (*Neuman v. S.W.R. Co.*, 24 Q. B. D. 454); and poverty might be a ground for dispensing with (or reducing, *Davis v. Mellodew*, 80 L. T. Jo. 283) it (*Burr v. Hubbard*, W. N. (83) 198; *Comp. Pacifique v. Guano Co.*, W. N. (83) 166; *Smith v. Went*, 32 W. R. 512; *Henderson v. Ripley*, W. N. (84) 85).

"Pay into Court."—See S. C. F. R. 1905, r. 30; App. Nos. 10, 11, Ann. Pr., Vol. II., Pt. III.; D. C. P. p. 1534; D. C. F. pp. 952, 953; Seton, p. 64; Chitty, F. p. 279.

Time for paying in.—If the order directs security for costs to be given, the payment in must be made before discovery and a receipt for the same served with the order.

"The Sum of £5."—The order should specify the amount (if any) to be paid in, but the practice is that if it is omitted 5*l.* must be paid in. The old practice where more than one party was required to make discovery was as follows: Where the same set of interrogatories was delivered to two or more defendants, each defendant to answer all or some of them, only one deposit need be made (*Eder v. Attenboro'*, 23 Q. B. D. 130; and see *The Whickham*, 53 L. T. 236, a co-ownership action where thirty-four defendants appeared by the same solicitor, and where only one deposit of 5*l.* was made). But where there were different defendants defending by separate solicitors, and each having independent rights, or where separate and distinct sets of interrogatories were delivered to each, *seem* that a deposit would have had to be made in respect of each defendant (*Eder v. Attenboro'*, commenting on *Smith v. Reed*, W. N. (83) 196), and so held in *Liverpool & Manchester A. B. Co. v. Firth*, (1891) 1 Ch. 367, explained in *Joyce v. Beall*, *infra*, as not intended to decide anything inconsistent with *Eder v. Attenboro'*. Where after delivery of interrogatories to a defendant the plaintiff obtained an order for further interrogatories against him, the practice was to require a further deposit of 5*l.* A plaintiff suing two or more defendants for one and the same cause of action was not bound (but the judge in his discretion might so order) to make more than one deposit of 5*l.* for discovery of documents against them, though they sever in their defence; otherwise where the action was really two or more actions combined, as where defendants were sued alternatively for different causes of action (*Joyce v. Beall*, (1891) 1 Q. B. 459, explaining *Liverpool & M. Co. v. Firth*, *supra*, where plaintiff was ordered to make a deposit in respect of each defendant for interrogatories and also a deposit for discovery of documents). One deposit was sufficient on an application for an order for an affidavit of documents against co-plaintiffs (*Campbell v. Poulett*, W. N. (84) 48).

"Any less Sum."—See *Davis v. Mellodew*, *supra*.

"Such Additional Sum."—See *Joyce v. Beall*, *supra*. The discretion is not limited to the time of making the order, but may be

O. 31,
rr. 26—29.

exercised at any time when the circumstances shew that further security is required (*Cooke v. Smith*, (1891) 1 Ch. 509).

"Time for Answering," &c.—That is where payment is ordered.

"Shall not be required to Answer," &c.—The interrogatories cannot be set aside or struck out, but there is no obligation to answer (*Eder v. Attenboro'*, 23 Q. B. D. 130, disapproving *Smith v. Reed*, *supra*).

369.

Final disposition of money standing to "Security for Costs Account."

27. Unless the court or a judge shall at or before the trial otherwise order, the amount standing to the credit of the "Security for Costs Account" in any cause or matter, shall after the cause or matter has been finally disposed of be paid out to the party by whom the same was paid in on his request, or to his solicitor on such party's written authority, in the event of the costs of the cause or matter being adjudged to him, but, in the event of the court or judge ordering him to pay the costs of the cause or matter, the amount in court shall be subject to a lien for the costs ordered to be paid to any other party.

See (nn.) to r. 27A.

The plaintiff made his deposit; he wished to waive discovery and have it returned. *Held*, that it was not a security for the costs of discovery only, but for the general costs of the action (*Jubb v. Bibbs*, W. N. (83) 208; and see *Eder v. Attenboro'*, 23 Q. B. D. p. 135).

If the solicitor finds the money, it is not a "disbursement," but should be entered in his cash account (*Re Buckwell*, (1902) 2 Ch. 596).

369a.

Certificate for payment out of money lodged to "Security for Costs Account."

27A. If after a cause or matter has been finally disposed of, by consent or otherwise, no taxation of costs shall be required, the taxing officer, Master, or Chief Clerk (as the case may be) may, either by consent of the parties, or on being satisfied that any party who has lodged any money to the "Security for Costs Account" in such cause or matter has become entitled to have the same paid out to him, give a certificate to that effect, which certificate shall be acted on and have effect in all respects as if the same had been an order made in the said cause or matter.

See S. C. F. R. 1905, r. 44, App. No. 14 (c), Ann. Pr., Vol. II., Pt. III., D. C. P. p. 1535; D. C. F. p. 954; Chitty F. pp. 280, 281.

370.

Discovery against sheriff

28. In any action against or by a sheriff in respect of any matters connected with the execution of his office, the Court or a judge may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

Order to apply to infants.

29. This order shall apply to infant plaintiffs and defendants, and to their next friends and guardians *ad litem*.

R. S. C. Nov. 1893, r. 16. Prior to this rule no discovery could be had from them. No provision is made for the case of lunatics and persons of unsound mind, as to which, see Bray, pp. 63–67. (See as to inspection in Lunacy, Ann. Pr., Vol. II.) See generally Article 3, *supra*.

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